Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

CLARK COUNTY, NEVADA AND
MORGAN HARRIS,

Petitioners,

v.

ROBERTO MIRANDA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS D. BEATTY
Law Offices of Thomas Beatty
601 E. Bridger Avenue
Las Vegas, NV 89101
(702) 382-5111

Counsel for Petitioner Harris

DAVID ROGER
District Attorney
JANSON F. STEWART
Chief Deputy District Attorney
500 S. Grand Central Pkwy.
Las Vegas, NV 89155
(702) 455-4761

Counsel for Petitioner Clark County

LAWRENCE S. ROBBINS*
ALAN E. UNTEREINER
ALISON BARNES
MAX HUFFMAN
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

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QUESTIONS PRESENTED

In *Polk County* v. *Dodson*, 454 U.S. 312 (1981), this Court held that a public defender does not act "under color of state law" within the meaning of 42 U.S.C. § 1983 when he performs his "traditional functions" (454 U.S. at 325) as a lawyer representing a client against the State. The Court left open, however, the possibility that a public defender might be a state actor when "performing certain administrative and possibly investigative functions" (*ibid.*). In this case, respondent, having secured habeas corpus relief on the basis of a claim of ineffective assistance of trial counsel, sued not only the deputy public defender who handled his trial, but also petitioner Morgan Harris, the head of the Clark County Public Defender's Office, as well as petitioner Clark County itself. The questions presented are:

1. Whether the Ninth Circuit correctly held that petitioner Harris was performing "administrative functions," and therefore acting "under color of state law," when he implemented two alleged "policies" of the Clark County Public Defender's Office: (a) administering polygraph examinations to new clients and then allocating fewer resources to clients who appear to be lying; and (b) assigning inexperienced and untrained lawyers to handle the most serious felony cases.

2. Whether the Ninth Circuit correctly held that those two alleged policies are prohibited by the Sixth Amendment guarantee of effective assistance of counsel.

3. Whether, for purposes of municipal liability under *Monell* v. *Dept. of Social Servs.*, 436 U.S. 658 (1978), a chief public defender can be a policymaker *for a county* in areas affecting client representation when (a) applicable state law *precludes* outside influence in these areas and recognizes that public defenders are independent officers, and (b) the Federal Constitution imposes on the county an "obligation to respect the professional independence of the public defenders whom it engages" (*Polk County*, 454 U.S. at 321-22).

RULE 14.1(b) STATEMENT

Pursuant to Rule 14.1(b), petitioners state that the only party before the court of appeals who is not named in the caption is defendant-appellee Thomas Rigsby.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The *en banc* opinion of the Ninth Circuit (App., *infra*, 1a-19a) is reported at 319 F.3d 465. The opinion of the three-judge panel (App., *infra*, 20a-33a) is reported at 279 F.3d 1102. The district court's decision granting petitioners' motion to dismiss (App., *infra*, 36a-45a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 2003. App., *infra*, 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Pertinent provisions of the Civil Rights Act of 1871, 42 U.S.C. § 1983, the Nevada Revised Statutes, and the Nevada Supreme Court Rules are set forth at App., *infra*, 47a-50a.

STATEMENT

A closely divided *en banc* panel of the Ninth Circuit has blazed three new constitutional trails in this case. First, notwithstanding this Court's holding in *Polk County* v. *Dodson*, 454 U.S. 312 (1981), the majority – in conflict with closely comparable decisions of the Eighth and Tenth Circuits – held that petitioner Morgan Harris, the Chief Public Defender for Clark County, Nevada, was acting "under color of state law" within the meaning of 42 U.S.C. § 1983 when he implemented two alleged policies of the Public Defender's Office: (i) administering polygraph examinations to new clients and then allocating fewer resources to clients who appear to be lying; and (ii) assigning inexperienced and untrained lawyers to handle the most serious felony cases. Building on that premise, the majority next held that both such policies are prohibited by the Sixth Amendment's guarantee of effective assistance of counsel. Finally, the majority ruled that Clark County itself could be held liable under *Monell* v. *Department of Social Services*, 436 U.S.

658 (1978), even though under Nevada law it had no authority to review, approve, or countermand the Chief Public Defender's policies relating to the proper handling of litigation in his office – and such interference would violate the County's duty under the Federal Constitution to "respect" the Chief Public Defender's "professional independence." *Polk County*, 454 U.S. at 321.

Because those rulings promise to saddle already overburdened public defenders' offices, and the counties and municipalities that create them, with innumerable civil actions raising little more than constitutionalized malpractice grievances, further review is warranted.

A. Factual Background

This case arises out of respondent Roberto Miranda's August 1982 convictions under Nevada law of first-degree murder with a deadly weapon, robbery with a deadly weapon, and larceny – crimes for which he received a sentence of death. App., *infra*, 37a. In 1985, the Nevada Supreme Court affirmed Miranda's conviction and sentence on direct appeal. 707 P.2d 1121. Fourteen years after the conviction, however, a Nevada trial court granted respondent's state habeas petition on the ground that Thomas Rigsby, a deputy public defender who had represented Miranda, had failed to provide him with effective assistance of counsel. App., *infra*, 2a. Thereafter, Nevada chose not to retry respondent Miranda, and he was freed.

B. Proceedings Below

1. Miranda brought suit under 42 U.S.C. §§ 1983 and 1985(3) against Deputy Public Defender Rigsby; petitioner Morgan Harris, the head of the Clark County Public Defender's Office; two Las Vegas police detectives who had worked on the murder investigation; petitioner Clark County; and five "John Does" who allegedly were employees of Clark County. See Court of Appeals Excerpt of Record ("C.A. ER") 1-52. In pertinent part, the complaint identified two alleged "policies" of the Clark County Public Defender's Office that, according to

Miranda, had abridged his Sixth Amendment rights. First, respondent said, the Public Defender has "a policy, custom, or practice" of "assign[ing] inexperienced and untrained attorneys to capital and other major felony cases." C.A. ER 43, 45 (Cplt. ¶¶ 134, 138). Second, he alleged, the Public Defender's Office has a "policy of allocating investigative and defense resources based upon the client's performance on a polygraph examination." C.A. ER 36 (Cplt. ¶¶ 99, 120). Because Miranda "did not do well" on the polygraph test (C.A. ER 11 (Cplt. ¶ 34)), he allegedly was provided "an inadequate investigation and a substandard defense." C.A. ER 36 (Cplt. ¶ 120).

2. The district court dismissed Miranda's claims against Rigsby, Harris, and Clark County (App., *infra*, 36a-45a), and a Ninth Circuit panel (Trott, J., joined by Sneed and Tallman, JJ.) unanimously affirmed. The panel first concluded that the claims against Rigsby were properly dismissed under *Polk County* because Rigsby's pretrial decisions fell squarely within "a lawyer's traditional duties." App., *infra*, 28a (emphasis added). Miranda's claims against petitioners Clark County and Harris were properly dismissed because the alleged policies challenged by Miranda "are not unconstitutional." *Id.* at 21a. With respect to the polygraph policy, the panel could discern no reason why the use of a polygraph test crosses the constitutional line, in view of the fact that it "is just another factor – like, e.g., the existence of inculpatory evidence, the applicability of favorable case law, a defendant's criminal history – which can help a public defender to plan his client's defense and to predict the possible outcome of the case." *Id.* at 31a. Indeed, the panel observed, "[i]f polygraph *evidence* may be used at trial, then its use by the County to assist the decision-making process here under review is clearly not constitutionally suspect." *Id.* at 32a.[1]

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[1] The panel also noted that "federal agencies such as the Federal Bureau of Investigation and the Central Intelligence Agency routinely use the polygraph as a tool in many different arenas," and so do private employers in limited circumstances. App., *infra*, 32a (citing the Employee

Nor was it unconstitutional not to train deputy public defenders. App., *infra*, 32a-33a. For a lack of training to amount to "deliberate indifference" under *City of Canton* v. *Harris*, 489 U.S. 378 (1989), the panel explained, "the need for training must be obvious and violation of constitutional rights must be a highly predictable consequence." App., *infra*, 32a-33a. But Rigsby, like his peers in the office, was (*id.* at 33a):

> a law school graduate, a member in good standing of the state bar, and was hired for a deputy public defender position on the basis of his perceived abilities. Accordingly, the County's assignment of him to represent Miranda did not evince deliberate indifference to Miranda's right to effective assistance of counsel.

3. An 11-judge panel – lacking two of the three members of the unanimous original panel (Judges Trott and Tallman) – reheard the case *en banc*. Although the *en banc* court unanimously agreed that under *Polk County* Rigsby was not a state actor (App., *infra*, 4a-5a, 10a, 19a), a majority sustained the claims against petitioners Harris and Clark County over the sharp dissents of four members of the court.

a. The majority turned first to the question whether Harris was a state actor. Chief Judge Schroeder, writing for the court, concluded that "[t]he nature and context of Harris's function was administrative." App., *infra*, 5a. As "the administrative head of the County Public Defender's Office," Harris "was not acting" "under any of the ethical standards of the lawyer-client relationship to which Rigsby was bound." *Ibid.* Instead, he was, "according to the complaint, acting solely as the administrative head of the agency, responsible for allocating the office's

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Polygraph Protection Act of 1988, 29 U.S.C. § 2006 (2001)). It also pointed out that in *United States* v. *Scheffer*, 523 U.S. 303, 312 (1998), this Court held that individual jurisdictions could decide whether polygraph evidence is admissible (and the Ninth Circuit has since held that the decision is within the trial court's discretion). App., *infra*, 32a.

finite resources." *Ibid.* That role, the majority held, "materially differs from the relationship inherent in a public defender's representation of an individual client" and "falls within the type of administrative action adumbrated by the Supreme Court in *Polk County*." App., *infra*, 6a-7a. Because Harris "was performing essentially an administrative role on behalf of Clark County" (*id.* at 6a), he was a state actor.

On the merits, the majority held that respondent had stated claims that both the challenged policies were unconstitutional. App., *infra*, 6a-10a. As the majority construed the complaint, the Public Defender "subjected each client to a polygraph test and then allocated the resources of the office according to the result of that test." *Id.* at 6a. Such a policy, the majority reasoned, "means that those clients who claimed innocence, but appeared to be guilty, were provided inadequate resources to mount an effective defense." *Ibid.* And a system of allocating resources on that basis constitutes "deliberate indifference to the requirement that *every* criminal defendant receive adequate representation, regardless of innocence or guilt." *Id.* at 7a-8a (citing *Gideon* v. *Wainwright*, 372 U.S. 335 (1963)). The majority left open the possibility that the Constitution might permit *some* use of a polygraph in allocating resources, but held that "polygraph results cannot be determinative" in any given case. App., *infra*, 8a.

Finally, the majority held that respondent's challenge to Harris's alleged "policy of assigning the least-experienced attorneys to capital cases without providing any training" also stated a valid claim under 42 U.S.C. § 1983. App., *infra*, 9a. "[C]onstrued liberally," the majority stated, respondent's complaint "alleges not merely an isolated assignment of an inexperienced lawyer, but a deliberate pattern and policy of refusing to train lawyers for capital cases known to the county administrators to exert unusual demands on attorneys." *Ibid.* *That* allegation, the majority reasoned, stated a valid claim under *City of Canton* of "deliberate indifference to constitutional rights." App., *infra*, 9a-10a.

b. Judge Kleinfeld, joined in part by Judge Silverman, dissented from the reinstatement of the claims against Clark County and Harris. Judge Kleinfeld (writing for himself) first took issue with the majority's characterization of the allegations in the complaint. The majority, he wrote, "assumes that Harris used the polygraph to sort out the innocent from the guilty and allocate the most resources to the innocent" – but "[t]he complaint doesn't say that." App., *infra*, 11a. Instead, the complaint merely says that polygraph results were used to distinguish defendants who lie from defendants who tell the truth (and not to determine innocence or guilt). "[T]o an experienced criminal defense lawyer," Judge Kleinfeld explained, "the distinction between lying and telling the truth is altogether different from (and much more important than) the distinction between guilt and innocence." *Id.* at 11a-12a. If prosecutors and police do their job well, "the public defender will have few innocent clients"; but a defendant who lies to his or her lawyer makes it "very difficult * * * to prepare a good defense or negotiate effectively for a plea agreement" and "wastes the lawyer's time and his office's resources with a whole lot of rabbit tracks that consume scarce investigative and legal resources but don't lead anywhere." *Ibid.* Given these practical realities, the polygraph policy reflects the quintessential "lawyer's decision" – and "it falls within the 'exercising her independent judgment' for which *Polk County* holds that section 1983 liability may not lie." *Id.* at 14a (quoting 454 U.S. at 324-25).

Nor, Judge Kleinfeld added, did the complaint actually allege that the County has a policy of providing "ineffective assistance of counsel" – as opposed to "minimal investigation" and a "limited defense" – to defendants who refused to be truthful with their own lawyers. App., *infra*, 14a. "The constitutional floor is not massive or substantial resources, it's effective assistance"; so long as the assistance was not ineffective, the County's alleged policy could not be unconstitutional. *Ibid.*

Finally, Judge Kleinfeld, joined by Judge Silverman, also disagreed with the majority about the policy of not training deputy public defenders. To begin with, he wrote, *Clark County* itself had nothing to do with work assignments or training, and the complaint itself alleged only that petitioner Harris, not the County, had established the policy for the Public Defender's Office. Under *Monell* and *City of Canton*, the County could not be liable vicariously for the deeds of the Public Defender's Office. App., *infra*, 15a. "There is no reason to think the Clark County Board of Commissioners, as opposed to the county public defender, has any policy, or is allowed any say, as to which lawyers handle which cases in the public defender's office" – in fact, "[t]he complaint doesn't allege it." *Id.* at 16a. Thus, the claims against Clark County were properly dismissed.[2]

c. Judge Silverman, joined by Judges Sneed and T.G. Nelson, wrote a separate partial dissent, disagreeing with the majority's disposition of the claims against Clark County and Harris. App., *infra*, 19a. Focusing on Chief Public Defender Harris, Judge Silverman "read *Polk County* to hold that a public defender – be it an assistant P.D. or the head of the office – does not act under color of state law *when exercising independent professional judgment in connection with the defense of a client*." App., *infra*, 19a (emphasis added). A public defender's decision "as to which of his or her assistants to assign to a particular client, in a particular case," Judge Silverman explained,

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[2] Judge Kleinfeld also took issue with the majority's characterization of the attorney assignment "policy." App., *infra*, 16a. Far from alleging "that the county assigned inexperienced lawyers to try murder cases without assistance," the complaint states that "another lawyer, Douglas DeJulio, assisted Mr. Rigsby at trial, but was not involved in the pretrial investigation or preparation." *Ibid.* (footnote and internal quotations omitted). Thus, "Miranda actually pled that the public defender had a policy of using a lawyer with a year and a half of experience to prepare the case, but rather than send him into the courtroom alone, the office policy provided for experienced counsel to backup the green lawyer and give advice at trial." *Ibid.*

"is directly related to the defense of the client." *Ibid.* And "[t]he same goes for the use of the polygraph examination and other aspects of trial preparation." *Ibid.* Because Miranda's claims challenge a public defender's "decisions pertaining to the client's representation," they were properly dismissed for lack of state action. *Ibid.*

REASONS FOR GRANTING THE PETITION

In the courts below, the 14 federal judges who have examined the constitutional claims brought by respondent against petitioners Clark County and Chief Public Defender Harris have evenly divided over whether those claims should be dismissed for failure to state a valid claim. Without review by this Court, however, a dubious state-action ruling will allow demonstrably unmeritorious constitutional claims for damages to proceed against beleaguered and overtaxed public defenders and counties – not just in this case, but in any other case an imaginative lawyer can get over the Ninth Circuit's exceedingly low threshold. At the same time, if left uncorrected the decision below will invite a new wave of habeas claims in the Ninth Circuit by prisoners claiming to have suffered Sixth Amendment violations because the alleged policies at issue in this case – or others like them – were applied in their criminal cases by their public defenders.

The vexing questions raised by this case deserve an answer from this Court. And this case is an excellent vehicle – coming up, as it does, on a motion to dismiss – to address three critically important questions concerning the proper application of the federal civil rights laws to the activities of public defenders in connection with their representation of indigent clients.

I. THE NINTH CIRCUIT'S HOLDING THAT HARRIS IS A STATE ACTOR WARRANTS REVIEW

In *Polk County*, this Court held that a public defender who "exercis[es] her independent professional judgment * * * when performing a lawyer's traditional functions as counsel to a de-

fendant in a criminal proceeding" does not act under color of state law for purposes of a Section 1983 claim. 454 U.S. at 324-325.[3] But the Court observed: "It may be * * * that a public defender also would act under color of state law while performing certain administrative and possibly investigative functions." *Ibid.* The Court pointed out that in *Branti* v. *Finkel*, 445 U.S. 507 (1980), which involved the firing of assistant public defenders based on their political views, the Court had upheld the imposition of liability under the First Amendment for "making hiring and firing decisions on behalf of the State." *Polk County*, 454 U.S. at 324-25.

In the decision below, the *en banc* majority ruled that Chief Public Defender Harris was acting under color of state law in implementing the polygraph and attorney assignment policies that are the basis for Miranda's Sixth Amendment claims. In the majority's view, that is so because Harris was acting "administrative[ly]" and not "under any of the ethical standards of the lawyer-client relationship to which Rigsby was bound." App., *infra*, 5a. The majority likened Harris's implementation of the polygraph policy to "allocating the county's funds," which was "a function similar to that performed by the head of every government administrative office." *Id.* at 6a.

That holding warrants this Court's review because it answers an important question left open by this Court in *Polk County* in a manner that conflicts with the decisions of other circuits and is manifestly incorrect.

A. *The Conflict in the Lower Courts.* In resolving substantially comparable claims – involving a public defender's policy of refusing to furnish copies of transcripts to clients without cost – the Eighth and Tenth Circuits have taken a sharply broader view of *Polk County*, rejecting state action allegations.

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[3] The "under color of law" requirement in 42 U.S.C. § 1983 is identical to the "state action" requirement for determining whether a constitutional violation exists. See *Georgia* v. *McCollum*, 505 U.S. 42, 53 n.9 (1992).

In *Eling* v. *Jones*, 797 F.2d 697, 698 (8th Cir. 1986), cert. denied, 480 U.S. 917 (1987), three prisoners, "on behalf of themselves and others similarly situated," brought a Section 1983 action against the State Public Defender challenging, as a deprivation of their Sixth Amendment counsel rights, the "policy of the public defender's office" not to provide free copies of trial transcripts to clients. *Id.* at 698, 699. The Eighth Circuit affirmed the district court's dismissal of the case. In its view, "the Public Defender exercised a certain amount of discretion and used professional judgment in deciding not to order copies of the transcripts." *Id.* at 699. In addition, the policy decision of the Public Defender not to provide trial transcripts to the clients was "taken in his capacity as an attorney; the Public Defender was dealing with [the prisoners] as clients." *Ibid.* Because the defender exercised "independent professional judgment," *Polk County* controlled. *Ibid.*

Relying on *Eling*, the Tenth Circuit reached the same conclusion in an unpublished decision. See *Brown* v. *Langdon*, 1993 WL 372685 (10th Cir. Sept. 24, 1993). There, too, an indigent prisoner sued his public defenders for denying his requests for a free copy of his trial transcript, claiming that "the policy of the Wyoming Public Defenders in the handling of indigent criminal defendants' documents is violative of the Fourteenth Amendment." *Id.* at *1. In affirming a dismissal, the Tenth Circuit explained that the state action issue was controlled by *Polk County*. "[T]he refusal of a state public defender to furnish a copy of a trial transcript to an indigent prisoner represented by the public defender does not state a claim under [Section] 1983." *Id.* at *2 (citing *Eling*).

There can be little doubt these cases would have come out the opposite way in the Ninth Circuit under the approach taken by the *en banc* majority. In *Eling*, no less than here, the policy being challenged was issued by "the administrative head of the * * * Public Defender's Office." App., *infra*, 5a. By promulgating the policy challenged in *Eling*, the head of the Public Defender's Office could just as easily be described as engaging

in a "function" whose "nature and context * * * was administrative." *Ibid.* The decision not to expend scarce resources on making copies of transcripts is susceptible to being characterized as "allocating the [government's] funds," which is "a function similar to that performed by the head of every government administrative office." *Id.* at 6a. But the Eighth and Tenth Circuits, unlike the *en banc* majority in this case, recognized that what a public defender does "in his capacity as an attorney" involves the exercise of "independent professional judgment." Merely because some of those actions unavoidably have an "administrative" quality, it does not follow that they are any less essential to the basic representation of criminal clients.

B. *The Issue Is Important and Recurring.* As the Ninth Circuit's grant of *en banc* rehearing suggests, the question whether the head of a public defender service is a state actor when assigning cases or when allocating investigative resources is of profound significance. If permitted to stand, the decision below will adversely affect the independence of public defender services in the Ninth Circuit and will encourage the proliferation of constitutional claims against overburdened public defender services and individual public defenders. See App., *infra*, 18a (Kleinfeld, J.) (criticizing majority decision as "[h]eavy-handed regulation of public defenders' offices" by the federal courts).[4] It will also undermine, rather than advance, the interests of indigent criminal defendants, by diverting scarce resources from the operation of public defender offices to the defense of civil damages actions under 42 U.S.C. § 1983.

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[4] In almost all jurisdictions, public defenders and their staff attorneys carry heavy caseloads and operate with extremely limited resources. Ogletree, *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 85 (1995); see also Sadoff, *The Public Defender as Private Offender: A Retreat From Evolving Malpractice Standards for Public Defenders*, 32 AM. CRIM. L. REV. 883, 890 (1995) (noting that civil claims "tie up a public defender's precious time").

The Ninth Circuit's decision lays the groundwork for an unprecedented expansion of Section 1983 liability and implicitly authorizes state involvement and intrusion in decisions closely related to the representation of indigent criminal defendants. Under the logic of the Ninth Circuit's decision, the State has the right to control the allocation of resources and the assignment of an attorney to a client represented by the public defender service because the head of the public defender service performs these tasks. In *Polk County*, however, this Court emphasized the State's constitutional obligation to ensure that a public defender is *free* of state control. See 454 U.S. at 321 (recognizing the State's duty "to respect the professional independence of the public defenders"); accord *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984) (rejecting interferences with "constitutionally protected independence of counsel").

The negative ramifications of the Ninth Circuit's decision are magnified by the ambiguity inherent in the Ninth Circuit's notion of an "administrative" function and the very real potential for circumventing *Polk County* by repackaging claims of ineffective assistance against a public defender as claims based on some office-wide "practice," "custom," or "policy." Virtually *any* decision a lawyer makes, undertaken in the course of representation and based on the application of professional judgment to a client's case, is susceptible to being recharacterized as the implementation by that lawyer of some broader "policy" or "practice." Indeed, because decisions by experienced lawyers ordinarily are made by reference to their prior experience in similar cases, every decision must follow *some* policy or practice. The germane question is not whether the lawyer's conduct may be traced to "good practices" or a formal or informal policy within the public defender's office, but rather whether it is related to the representation of clients and the conduct of the defense – and is therefore a professional decision – or instead made in a context "having nothing to do with the

defense of a client." App., *infra*, 19a (Silverman, J., dissenting).[5]

The Ninth Circuit's decision has the additional untoward effect of creating a new type of Section 1983 claim available to prisoners and aggrieved criminal defendants – classes of persons known for their prolific, and largely frivolous, litigation.[6] In the courts below, respondent admitted that prisoners file "abundant suits * * * against their public defenders," which, before the Ninth Circuit's ruling, "result[ed] in nearly universal dismissal." Resp. C.A. Sugg'n for Reh'g En Banc, at 3. For prisoners already prone to frivolous litigation, the decision below only provides fuel for the fire.[7] Before public defenders are faced

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[5] There is no functional difference between a deputy public defender's decision to follow the "practice" of giving polygraph examinations to all of his clients and a Chief Public Defender's decision to apply the same "policy" for all of *his* clients (*i.e.*, all of the clients of the office). Both decisions equally involve the exercise of independent professional judgment; both are equally related to the representation of clients and the conduct of the defense. There is no good reason why these two scenarios should be treated differently under *Polk County*.

[6] In 2000 alone, prisoners filed close to 60,000 petitions in federal court. Bureau of Justice Statistics, *Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000*, <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf>. Of these, 44% were civil rights claims filed under Section 1983 or *Bivens*. *Ibid.* With few exceptions, these claims are frivolous. See Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES, Mar. 21, 1994, at A1 (97% of prisoner civil rights claims filed in 1993 were dismissed before trial; only a small number of remaining claims resulted in any relief for the prisoner).

[7] The sheer number of potential plaintiffs – indigent clients served by public defenders – is extraordinarily large. In 1999 alone, public defender services in large counties handled approximately 3.44 million cases on behalf of indigent defendants. See Bureau of Justice Statistics, *Indigent Defense Services in Large Counties, 1999*, <http://www.ojp.usdoj.gov/bjs/pub/pdf/idslc99.pdf>. For indigent defendants seeking to "lay full blame for the faults of the system at the

with the inevitable avalanche of litigation, this Court should define the precise contours of state action by public defenders.

This Court has repeatedly granted review to address issues related to the meaning and applicability of *Polk County*. *E.g.*, *Brentwood Academy* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 303-04 (2001); *Georgia* v. *McCollum*, 505 U.S. 42, 54-55 (1992); *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 626-27 (1991); *West* v. *Atkins*, 487 U.S. 42, 52 (1988); *Blum* v. *Yaretsky*, 457 U.S. 991, 1008-09 (1982). The Court's frequent forays into this area reflect the importance of the state action doctrine as the dividing line between private and governmental conduct. They also demonstrate the need for refining and clarifying the *Polk County* rule, which is an important exception to the usual treatment of state employees as state actors. The need for clarification is even greater here since the vague "administrative" exception recognized by the Ninth Circuit, unless carefully confined, threatens to swallow up the protections granted to public defenders by *Polk County* itself.[8]

C. *The Majority's State Action Holding Is Wrong.* The Ninth Circuit's decision also warrants further review because it is wrong. As Judges Silverman, Sneed, and T.G. Nelson persuasively argued in dissent, the challenged policies ought to be shielded under *Polk County* because they both involve "deci-

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feet of their public defenders" (Ogletree, *supra* note 4, at 87), the Ninth Circuit's decision provides a means to get into federal court and litigate the issue at least through the summary judgment phase.

[8] The *en banc* majority's holding will also serve as a strong disincentive for public defenders' offices to develop and implement office-wide policies, including those embodied in written manuals, to help rationalize and promote a more efficient and coordinated approach to litigation – a reform that has gained momentum in recent years and is recommended by many experts in the field. See Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2434 (1996); *Guidelines for Legal Defense Systems in the United States* (National Study Comm'n on Defense Services, 1976).

sions pertaining to the client's representation." App., *infra*, 19a. A public defender's decision "as to which of his or her assistants to assign to a particular client, in a particular case," Judge Silverman explained, "is directly related to the defense of the client." *Ibid.* And "[t]he same goes for the use of the polygraph examination and other aspects of trial preparation." *Ibid.*

The flaws in the majority's conclusion were further underscored by Judge Kleinfeld, who agreed with the other dissenters that "assignment of cases and work within cases to junior lawyers * * * is quintessentially part of [the] legal representation." App., *infra*, 15a. Moreover, Judge Kleinfeld examined the polygraph policy in light of the realities of criminal defense work (a perspective the majority simply ignored). "Despite the administrative ring of 'allocating resources,'" Judge Kleinfeld added, "this is not an administrative decision like [the] hiring or firing" in *Branti* v. *Finkel*, *supra*. App., *infra*, 13a. "[F]iring a public defender due to his party affiliation" is unrelated to effectively representing a client, whereas "[f]ew things are more central to representing criminal defendants than persuading them to tell their lawyers the truth." *Ibid.*

Equally mistaken was the majority's suggestion that *Polk County* was "not predicate[d]" on "whether the lawyer was in fact exercising 'independent judgment.'" App., *infra*, 5a. Here again, Judge Silverman got it right: *Polk County* is properly understood as "hold[ing] that a public defender – be it an assistant P.D. or the head of the office – does not act under color of state law *when exercising independent professional judgment in connection with the defense of a client*." App., *infra*, 19a (emphasis added). Thus, the crucial factor is whether the "policy" at issue has a connection to the actual work of defending a client. Both policies here plainly satisfy that test.

By holding that the head of a public defender service acts on behalf of the State (and not like private counsel) when he assigns cases to deputy public defenders and allocates office resources for the benefit of individual clients, the Ninth Circuit

assumes that he performs these functions for the benefit of the State and not (as he is required to do) for the benefit of his clients.[9] This conclusion apparently is based on the (inaccurate) assumption that these tasks are not part of the public defender's job of opposing the State's case. They are. This is a critical part, in short, of the "nature and context" of a public defender's conduct within the meaning of *Polk County*.

II. THIS COURT SHOULD CLARIFY THAT RESOURCE ALLOCATION AND ATTORNEY ASSIGNMENT POLICIES DO NOT VIOLATE THE SIXTH AMENDMENT

The Ninth Circuit ruled that the Chief Public Defender's alleged policies violated Miranda's constitutional right to the effective assistance of counsel. But the *en banc* majority's analysis of the alleged Sixth Amendment violation is seriously flawed and cannot be squared with this Court's teachings.

A. In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court outlined the contours of a criminal defendant's right to effective assistance of counsel, explaining that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. In keeping with that standard,

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[9] Even when making decisions about how to allocate limited resources, public defenders act to further the "goal of protecting and promoting the interests of [their] clients." Taylor-Thompson, *supra* note 8, at 2434. Like any other lawyer, a Chief Public Defender has an ethical obligation to abstain from taking direction or regulation in the rendering of legal services from a third party (the State or the County) that pays the bill. Nev. Sup. Ct. Rule 188.3 (2003) (adopting ABA Code of Professional Conduct, DR 5-107(B) (2003)); American Council of Chief Defenders, National Legal Aid and Defender Associations, Ethics Op. 03-01 (April 2003) (Chief Public Defender is ethically required to refuse new appointments that exceed a public defender service's capacity to provide competent, quality representation).

it required courts to consider "whether, in light of *all of the circumstances*, [counsel's] identified acts or omissions were outside the *wide range* of *professionally competent assistance*." *Id.* at 688 (emphasis added). When conducting that inquiry into the defense counsel's performance, courts must be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 690. To make out a valid Sixth Amendment claim, the defendant must also show that counsel's deficient performance actually prejudiced the defense (except in very limited circumstances of presumed prejudice). *Id.* at 687.

Instead of using that established framework to evaluate Miranda's Sixth Amendment claims, the *en banc* majority broadly held that any "policy" that "erodes the principles of liberty and justice that underpin our civil rights" is unconstitutional if it implicates a "core guarantee of the Sixth Amendment" and a "fundamental" right. App., *infra*, at 7a-8a. The majority's analysis of the polygraph policy proceeded in four steps. First, it construed the "policy" challenged in the complaint as one aimed at ascertaining not whether the client was truthful but whether he was guilty. *Id.* at 7a. Second, the majority stated that, if a client flunked the polygraph and thus was deemed guilty, "the office sharply curtailed the quality of the representation by limiting the investigatory and legal resources provided." *Ibid.* Third, the majority noted that the Sixth Amendment guarantee of effective assistance of counsel applies to "all defendants, regardless of guilt or innocence." *Ibid.* Fourth, it condemned the polygraph policy as one of "deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt." *Ibid.* "This is a core guarantee of the Sixth Amendment," the majority concluded, "and a right so fundamental that any contrary policy erodes the principles of liberty and justice that underpin our civil rights." *Id.* at 7a-8a.

The majority used a similar chain of logic in holding that the alleged policy "of assigning the least-experienced attorneys

to capital cases without providing any training" violated the Sixth Amendment. App., *infra*, at 9a. As a threshold matter, the majority construed the complaint "liberally" to allege "not merely an isolated assignment of an inexperienced lawyer, but a deliberate pattern and practice of refusing to train lawyers for capital cases known to the county administrators to exert unusual demands on lawyers." *Ibid.* So construed, the majority reasoned, the alleged policy was sufficient to support a valid Sixth Amendment claim of "'deliberate indifference to constitutional rights' in the failure to train lawyers to represent clients accused of capital offenses." *Id.* at 9a-10a.

B. The majority's analysis and holding stray from the fundamental teachings of *Strickland* in several key respects. As noted above, *Strickland* announced that violations of the Sixth Amendment for ineffective assistance of counsel occur only when defense counsel's performance falls below "an objective standard of reasonableness" in light of "all the circumstances." 466 U.S. at 688. This Court refused to adopt a "set of detailed rules" or standards for evaluating defense counsel's conduct in a given case because such rules would not be conducive to the individualized inquiry required in this context. *Id.* at 688-89. And the Court specifically rejected the argument that the failure to meet "prevailing norms of practice as reflected in the American Bar Association standards" or other "guidelines for representation" would necessarily violate the Sixth Amendment. *Id.* at 688-89. The Court rejected that approach because the purpose of the effective assistance guarantee of the Sixth Amendment "is simply to ensure that criminal defendants receive a fair trial," not "to improve the quality of legal representation." *Id.* at 689.

But the *en banc* majority did exactly what this Court refused to do in *Strickland*: it held that certain policies of a public defender (not the totality of an individual defense attorney's

conduct) automatically violate the Sixth Amendment.[10] Instead of engaging in the case-specific and contextual inquiry mandated by *Strickland*, the majority broadly decreed that both of the alleged policies were in effect *per se* violations of the Sixth Amendment. Indeed, the majority engaged in *no analysis* of the allegations relating to the overall quality of the representation provided in this case or of the relationship between the allegedly unconstitutional policies and that representation. The Ninth Circuit's holding is breathtaking, both for its expansiveness and for its potential repercussions for Sixth Amendment law in general.

C. The majority's far-reaching pronouncements are all the more perplexing because they are predicated on an implausible reading of the complaint, as Judge Kleinfeld's dissent persuasively demonstrates. App., *infra*, 10a-11a, 14a. There is no basis for reading the complaint – which was "drafted by able counsel" (*id.* at 14a) – as alleging that clients of the Public Defender's Office who "appeared on the basis of the polygraph test *to be guilty*" (*id.* at 7a (emphasis added)) were denied effective assistance of counsel. Instead, the complaint alleges that those who appeared on the basis of the polygraph test *to be untruthful* received a "substandard" or "limited" defense or a "minimal investigation" (as opposed to what the Sixth Amendment forbids: ineffective assistance of counsel). *Id.* at 11a, 14a. Equally ungrounded in the complaint is the majority's interpretation of the inexperienced-attorney policy. Compare *id.* at 9a ("a deliberate pattern and policy of refusing to train lawyers for capital cases known to the county commissioners to exert unusual demands") with *id.* at 16a (Kleinfeld, J.) (pointing out that complaint alleges that Rigsby was assisted by another deputy public defender not alleged to be inexperienced). Contrary to the majority's apparent belief, the liberal construc-

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[10] The reason for the court of appeals' strained approach is obvious: it could not pin the constitutional violation on the acts and omissions of the deputy public defender because he is not a state actor.

tion rule of *Conley* v. *Gibson*, 355 U.S. 41 (1957), is not a license to concoct new claims never made in the complaint.

D. If permitted to stand, the *en banc* opinion will provide the basis for a flood of ineffective-assistance claims arising from policies of public defender services, both in the context of Section 1983 claims and in (direct and collateral) criminal proceedings. In a countless number of cases, criminal defendants will now be able to argue that their Sixth Amendment rights were violated simply because their defense counsel acted pursuant to an "unconstitutional" resource allocation or attorney assignment policy. This would presumably cover a vast terrain of claims because almost all decisions made in the course of representing a criminal defendant can be characterized as decisions involving the allocation of resources and the assignment of an attorney. Morever, it is entirely foreseeable that those who were represented by the Public Defender's Office in Clark County will now seek to gain their release on the ground that they were subjected to policies that the Ninth Circuit has ruled violate the Sixth Amendment. The majority's analysis also provides a ready means of circumventing the core holding of *Polk County*, since almost any complaint about the handling of one's case by the non-state-actor public defender could be repackaged as a challenge to some policy (real or imagined) of the Public Defender's Office.

E. The Ninth Circuit's holding that the alleged policies violate the Sixth Amendment is mistaken. We discuss the two policies in turn.

1. *The Polygraph Policy*. The *en banc* majority's conclusion that the allocation of resources "solely or even principally based on polygraph results" is a constitutional violation (App., *infra*, at 8a) lacks support in the law and in common sense. To begin with, the majority offers no reason why use of a polygraph as a "determinative" factor violates the Sixth Amendment whereas its use in a "nondeterminative" fashion may not.

Nor does it explain how anything in the Sixth Amendment can plausibly be said to support that line. In fact, as Judge Trott took pains to point out for the unanimous three-judge panel, it is difficult to see how the use of a polygraph in this setting could be anything other than "constitutionally irrelevant." App., *infra*, at 32a. It is entirely reasonable (and constitutional) for a public defender to allocate fewer resources "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful." *Strickland*, 466 U.S. at 691. When all is said and done, a polygraph "is just another factor – like, e.g., the existence of inculpatory evidence, the applicability of favorable case law, a defendant's criminal history – which can help a public defender to plan his client's defense and to predict the possible outcome of the case." App., *infra*, at 31a. And, as Judge Kleinfeld correctly noted, there are important practical reasons why defense lawyers might elect to use a polygraph exam to ensure truthfulness on the part of their clients (precisely in order to allow for an *effective* representation of the client). *Id.* at 11a-14a.

2. *The Inexperienced-Attorney Policy*. The *en banc* majority's conclusion that a policy of assigning junior attorneys to capital cases is unconstitutional because it evidences "deliberate indifference to constitutional rights" is also wrong. App., *infra*, 9a-10a. That holding rests on the assumption that inexperienced lawyers will be ineffective. But this Court has unanimously held that the Constitution does not require defense counsel to have any particular level of experience to satisfy the Constitution. *United* States v. *Cronic*, 466 U.S. 648, 666 & n.38 (1984). "The character of a particular lawyer's experience * * * does not justify a presumption of ineffectiveness in the absence of * * * an evaluation of his actual performance. * * * We address not what is prudent or appropriate, but only what is constitutionally compelled." *Ibid.*; see also *Cooks* v. *Ward*, 165 F.3d 1283, 1292 n.5 (10th Cir. 1998) (not enough to "simply allege inexperience" when claiming a Sixth Amendment viola-

tion). As Judge Kleinfeld stated, "[i]t does not make sense, in the face of established law holding that assignment to inexperienced counsel with no special training does not support an inference of ineffective assistance even in death penalty cases, for the majority to infer such assignments, made as a matter of policy, do support such an inference." App., *infra*, 18a.

Equally baseless is the *en banc* majority's suggestion that the Sixth Amendment requires a public defender service to offer additional training to deputy public defenders who are licensed attorneys. As the opinions of Judges Trott and Kleinfeld persuasively demonstrate, there is "no analogy" to *City of Canton* because, unlike police officers (who may not have had any training before being hired by the County), "lawyers do necessarily go to law school (or in some states read law under supervision) before being hired as lawyers." App., *infra*, 17a. Thus, it cannot be "deliberate indifference" within the meaning of *City of Canton* for a public defender not to offer a licensed attorney further legal training. Accord *id.* at 33a (Trott, J.).

III. THE IMPOSITION OF LIABILITY ON CLARK COUNTY FOR THE "PRACTICES AND POLICIES" OF A FUNCTIONALLY INDEPENDENT PUBLIC DEFENDER WARRANTS THIS COURT'S REVIEW

Even if Morgan Harris *is* a state actor and his alleged "inexperienced attorney" and polygraph policies for the Public Defender's Office violate the Sixth Amendment, there is no basis on which petitioner *Clark County* can be held liable. Nevada law protects the functional independence of the Chief Public Defender with respect to the implementation of policies relating to how he makes attorney assignments and allocates resources. Viewed in that light, the *en banc* majority's largely unexplained conclusion simply cannot be reconciled with the Court's approach to municipal liability in a long line of cases, from *Monell* v. *Department of Social Services*, 436 U.S. 658, 694 (1978), to *McMillian* v. *Monroe County*, 520 U.S. 781, 785 (1997), or with the approach of other courts of appeals.

A. Imposing liability on a municipality for a public defender's policies and practices is in considerable tension with cases from this Court that define the boundaries of municipal liability. In *Monell*, the seminal Section 1983 municipal liability case, the Court held that a municipality can be sued when its "official policy" or custom is the "moving force" behind the alleged constitutional violation, but not when an injury is inflicted "solely by its employees or agents." 436 U.S. at 694. This holding reflects the fact that, "while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*." *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 479 (1986) (plurality opinion) (emphasis in original) (citing *Monell*, 436 U.S. at 665-83). Thus, this Court has consistently required "*deliberate* action *attributable to the municipality itself*" as a precondition for municipal liability under Section 1983. *Board of County Comm'rs* v. *Brown*, 520 U.S. 397, 400 (1997) (emphasis in original) (citing *Monell*, 436 U.S. at 694).

In *Monell*, the Court explained that municipal policies and customs can be created in two ways: (1) by the government legislative body itself, or (2) by a person whose acts "may fairly be said to represent official policy." *Monell*, 436 U.S. at 694. In subsequent cases, the Court has clarified how this process of creation works. *See, e.g.*, *Pembaur*, 475 U.S. at 479; *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120-21 (1988); *City of Canton* v. *Harris*, 489 U.S. 378, 386 (1989); *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989); *Brown*, 520 U.S. at 405. When municipal policy is alleged to have been established by a municipal official, a court must "identify those officials or governmental bodies who speak with final policymaking authority for the local government actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Jett*, 491 U.S. at 737. This inquiry is not "all or nothing": it turns on whether the official is a final policymaker "for the local government *in a particular area, or*

on a particular issue." *McMillian*, 520 U.S. at 785 (emphasis added) (citing *Jett*, 491 U.S. at 737, 738, and *Praprotnik*, 485 U.S. at 123).[11]

In *McMillian*, the Court held that state law controls the determination of which officials speak with final policymaking authority for the municipality in a particular area. *Id.* at 786 ("[O]ur understanding of the actual function of a government official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law."). This rule recognizes the "extremely wide latitude" possessed by the States "in determining the form that local government takes," and it accommodates the "rich variety of ways in which the power of the government is distributed among a host of different officials and official bodies." *Praprotnik*, 485 U.S. at 124-25. It also avoids the inequities that would result from "particular factfinder[s'] evaluation" of municipalities' power structures that fail to account for where final decisionmaking authority is placed by state lawmakers. *Id.* at 124 n.1.

B. Under this established legal framework, it is apparent that the Ninth Circuit went astray. In reversing the dismissal of the claims against Clark County, the *en banc* majority offered virtually no explanation for its holding that Morgan Harris is a final decisionmaker *for the County* on decisions regarding attorney assignment and resource allocation. The majority's entire analysis of this issue was its conclusory statement that "Harris was acting on behalf of Clark County in determining how the overall resources of the office were to be spent" and that "the resource allocation policy * * * subjects Harris to suit as a policymaker for Clark County." App., *infra*, 7a.

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[11] As in *McMillian*, the issue in this case is not whether an official with final decisionmaking authority is involved – there is no dispute that petitioner Harris, the Chief Public Defender, has made final decisions for the Public Defender's Office. The only issue is whether Harris acts *on behalf of the County* in doing so.

That terse explanation is all the more surprising because it comes over the dissent of four members of the *en banc* panel. In a portion of his dissent joined or concurred in by Judges Silverman, Sneed, and T.G. Nelson, Judge Kleinfeld disagreed with the majority's unexplained assumption that the alleged policy of not training deputy public defenders was one that was properly attributable to Clark County. "There is no reason," Judge Kleinfeld wrote, "to think that the Clark County Board of Commissioners, as opposed to the county public defender, has *any* policy, *or is allowed any say*, as to which lawyers handle which cases in the public defender's office" – in fact, "[t]he complaint doesn't allege it." App., *infra*, 16a (emphasis added); see also *ibid.* ("Since when do lawyers get their training from counties?"). Indeed, the majority opinion does not address how Harris binds the County when making specific decisions in his role as Chief Public Defender, nor does it include any discussion of Nevada law on this subject. Had it considered the effect of Nevada law, which recognizes that public defenders and their deputies are functionally independent of the municipalities that fund them, the *en banc* majority would have been forced to reach the opposite conclusion. By refusing to engage in any reasoned analysis of this issue, the majority departed from the approach clearly required under *McMillian*.

C. As the foregoing makes clear, the majority abdicated its responsibility to apply *state* law to the question of whether a public defender is a final decisionmaker *for a municipality*. In so doing, the majority ignored this Court's precedents, which require the application of state law (Nevada law in this case) regarding the role of public defenders in the County's power structure. See *Pembaur*, 475 U.S. at 483 (plurality opinion); *Praprotnik*, 485 U.S. at 124-25; *McMillian*, 520 U.S. at 786.

Not surprisingly, the Ninth Circuit's decision also conflicts with the approach taken by other circuits that have adhered to this Court's cases. For example, in *Turquitt* v. *Jefferson County*, 137 F.3d 1285 (1998), the Eleventh Circuit, sitting *en banc*, held that the determination of whether a county could be

held liable for a sheriff's administration of a jail (when he was the undisputed policymaker for that jail) "turns on state law, including state and local positive law, as well as custom and usage having the force of law." 137 F.3d at 1287. After completing an in-depth analysis of Alabama law, including consideration of state laws regarding the county's duty to fund and maintain jails and the sheriff's duty to staff and oversee them, the Eleventh Circuit concluded that the sheriff was not a decisionmaker *for the county*. *Id.* at 1288.

Under the Ninth Circuit's approach, the outcome in *Turquitt* would have been different. Indeed, under the reasoning (or lack thereof) used by the Ninth Circuit, the sheriff would have been deemed a decisionmaker for the county because he performed administrative tasks for the county, including the allocation of county resources to operate the jail, the appointment, direction, and control of the deputies who work at the jail, and the annual reporting of conditions within the jails. See 137 F.3d at 1289-90. But that result would fail to account for various state laws that place control over the sheriff in the hands of the State, not the County.[12]

D. The Ninth Circuit's decision that a municipality can be liable for the internal policies of a public defender, without reference to what degree of control state law gives the municipality, has profound implications for municipal liability in general as well as in the specific context of public defender services (or other agencies or offices created by counties that retain functional independence). Because of the complex nature of the municipal liability doctrine (see *City of Canton*, 489 U.S. at 386), as well as the abundant litigation filed against

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[12] The Ninth Circuit's decision also conflicts with several decisions of the Fourth Circuit. See *Grayson* v. *Peed*, 195 F.3d 692, 697-98 (4th Cir. 1999) (holding, based on analysis of state law governing adult detention center's operations, that county was not liable for center's internal policies because it had "no control over policy within the jail"); *Knight* v. *Vernon*, 214 F.3d 544, 552 (4th Cir. 2000).

municipalities under § 1983,[13] this Court should offer its guidance to lower courts on this question, which "is likely to recur in § 1983 litigation against municipalities." See *Praprotnik*, 485 U.S. at 121 (quoting *City of Newport* v. *Fact Concert, Inc.*, 453 U.S. 247, 256 (1981)). This case is an excellent vehicle to clarify the meaning of the *Monell* principle because it differs from cases such as *McMillian*, where courts are asked to decide whether an official speaks for the County as opposed to some higher organ of government (such as the State itself). In this case, the issue is how *Monell* applies to agencies or offices created by the County that are functionally independent under state law.[14]

In addition, the municipal liability issue raised in this case implicates important federalism concerns. This Court's review is needed to reaffirm that the determination of *Monell* liability for the acts of a policymaker "is dependent upon an analysis of state law." *McMillian*, 520 U.S. at 786. As noted above, this rule respects the States' "extremely wide latitude in determining the form that local government takes." *Praprotnik*, 485 U.S. at 124-25. If permitted to stand, the *en banc* majority decision implicitly authorizes courts to substitute their own judgment for

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[13] See Richardson, *Public Entity Liability Under 42 U.S.C. § 1983*, 41 FED. BAR NEWS & JOURNAL 351, 351 (1994) (noting that "cases against public entities have grown exponentially in the wake of *Monell*").

[14] Nevada is not unusual in insulating public defenders from county control. See, *e.g.*, *Hall County Public Defenders Org.* v. *County of Hall*, 571 N.W.2d 789, 793 (Neb. 1998) ("[T]he fact that the county board has the authority to disapprove a public defender's budget request does not mean the county board has authority to control other aspects of the public defender's office."); *Reese* v. *Danforth*, 406 A.2d 735, 738 (Pa. 1979) ("The county has no control over the manner of representation given indigents by the defender. The nature of the work involves the attorney-client relationship and is of a type that precludes outside interference or direction by the county."); *In re Brindle*, 154 Cal. Rptr. 563, 578 (Cal. Ct. App. 1979) (same); *Spring* v. *Constantino*, 362 A.2d 871, 878 (Conn. 1975) (same).

the judgment of state lawmakers regarding the distribution of municipal power.

Finally, review is needed to ensure that lower courts do not assign municipal liability in a way that is inconsistent with *Monell*. The Ninth Circuit's holding that a County can be liable for a public defender's policies suggests that municipalities can be held liable for policies that they did not create and cannot control. This cannot be reconciled with *Monell*'s holding that municipalities are the functional equivalent of corporations, which are responsible only for "their official acts." 436 U.S. at 685-86. Indeed, the Ninth Circuit's approach would impose liability that is far greater than the conception of municipal liability adopted in *Monell*, which refused to impose liability for the actions of a person whom the municipality had a "mere right to control" but did not actually control or direct. 436 U.S. at 694 n.58. The *en banc* majority in this case goes a step further than what this Court expressly rejected; it holds that a municipality can be liable for the actions of a person *whom it does not even have a right to control*. This means that a municipality can be liable for the actions of an official or entity that is insulated by state law from the municipality's control, such as an ombudsman or a public defender, so long as that official's position or the entity itself is publicly created and funded. The Court should grant review on this issue to rectify this unprecedented expansion of *Monell*.

E. The Ninth Circuit's decision is wrong. Under Nevada law a Chief Public Defender acts independently from, and certainly not on behalf of, the Board of County Commissioners when setting policies for the Public Defender's Office.

Nevada law empowers a County with a population of more than 100,000 people to create its own Public Defender's Office and to appoint a "qualified attorney licensed to practice law" to run it. NEV. REV. STAT. §§ 260.010(1), (5), 260.030(1). The Chief Public Defender is charged with the responsibility of "represent[ing] without charge each indigent person for whom

he is appointed" within "the limits of available money." *Id.* at § 260.050(2). At the latest, this representation begins when the court "designate[s] the public defender" as the indigent party's counsel. *Id.* § 171.188(3).[15] The public defender's responsibilities include "counsel[ing] and defend[ing] [his client] at every stage of the proceedings * * * and prosecut[ing] * * * any appeals or other remedies before or after conviction that he considers to be in the interests of justice." *Id.* at § 260.050(3). The public defender can appoint deputy public defenders and assign cases to them. *Sanchez* v. *Murphy*, 385 F. Supp. 1362, 1365 (D. Nev. 1974) (cited in *Polk County*, 454 U.S. at 321 n. 11); see also NEV. REV. STAT. § 260.040(2).

In addition to these statutory provisions, Nevada's Code of Professional Conduct governs the relationship among the County, the public defender (and his deputies), and the indigent client. It provides that "a lawyer shall exercise independent professional judgment and render candid advice" when representing a client. Nev. Sup. Ct. Rule 167 (2003). Interference with a lawyer's "professional judgment in rendering legal services" by a person or entity paying for such services is specifically prohibited. Nev. Sup. Ct. Rule 188.3 (2003). According to a Nevada court, these "canons of professional ethics" create an "obligation of unswerving loyalty and devotion" from a public defender to his assigned client and forbid "advice or pressure from others" that would interfere with the relationship. *Sanchez*, 385 F. Supp. at 1365. Consistent with these ethical standards, Nevada law treats a public defender representing a client (or his deputy assigned to handle the case in his stead) as an "independent officer." *Ibid.*

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[15] In some instances, the public defender may act on behalf of an indigent party even before being appointed by the court. See NEV. REV. STAT. § 260.050(1) (public defender may "interview an indigent person when he has been arrested and confined for a public offense or for questioning on suspicion of having committed a public offense" before being appointed).

Given this framework (which the Ninth Circuit entirely failed to consider), it was clear error to hold that a public defender acts as a decisionmaker *for a municipality* when applying his internal policies to cases assigned to him or delegated to his deputies. At the time when the public defender allocates resources to a client's case or assigns a deputy public defender to handle the matter in his stead, the public defender acts in his capacity as a lawyer for the indigent client and is bound by his ethical duty to exercise his professional judgment for the client's benefit. See NEV. REV. STAT. §§ 171.188(3), 260.050(2), (3); Nev. Sup. Ct. Rules 167 and 188.3.[16] Nevada law assigns no role to the County in making these decisions, nor could it. See *Polk County*, 454 U.S. at 321 (recognizing the State's duty under Federal Constitution "to respect the professional independence of the public defenders"); *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984) (referring to the "constitutionally protected independence of counsel"). To put it plainly, a public defender acts as an "independent officer" (*Sanchez*, 385 F. Supp. at 1365) – not a county policymaker – when making decisions regarding the representation of court-appointed clients, regardless of the "stage of the proceedings" (NEV. REV. STAT. § 260.050(3)) at which he makes them. Consistent with that independent role, the Public Defender has even initiated litigation challenging the conduct of the County Commissioners. See, *e.g.*, *Application of Robarts*, 485 P.2d 278 (Nev. 1971) (challenging selection of grand jurors by county commissioners).

CONCLUSION

The petition for a writ of certiorari should be granted.

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[16] There is no dispute that a deputy public defender acts in his capacity as a lawyer when he implements these policies after a case is assigned to him. See App., *infra*, at 4a-5a.

Respectfully submitted,

THOMAS D. BEATTY
Law Offices of Thomas Beatty
601 E. Bridger Avenue
Las Vegas, NV 89101
(702) 382-5111

Counsel for Petitioner Harris

DAVID ROGER
District Attorney
JANSON F. STEWART
Chief Deputy District Attorney
500 S. Grand Central Pkwy.
Las Vegas, NV 89155
(702) 455-4761

Counsel for Petitioner
Clark County

LAWRENCE S. ROBBINS*
ALAN E. UNTEREINER
ALISON BARNES
MAX HUFFMAN
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

MAY 2003

APPENDIX

APPENDIX A

United States Court of Appeals,
Ninth Circuit.

Roberto Hernandez MIRANDA, Plaintiff-Appellant,

v.

CLARK COUNTY, NEVADA; Morgan Harris; Thomas Rigsby, Defendants-Appellees.

No. 00-15734.

Argued and Submitted Sept. 19, 2002.

Filed Feb. 3, 2003.

Before: SCHROEDER, Chief Judge, SNEED, PREGERSON, REINHARDT, T.G. NELSON, KLEINFELD, HAWKINS, THOMAS, SILVERMAN, WARDLAW and BERZON, Circuit Judges.

Opinion by Chief Judge SCHROEDER; Partial Concurrence and Partial Dissent by Judge KLEINFELD; Partial Concurrence and Partial Dissent by Judge SILVERMAN.

SCHROEDER, Chief Judge.

We took this case en banc to consider whether the head of a county public defender's office, as the administrative head of an organization formed to represent criminal defendants, may be held accountable under 42 U.S.C. § 1983 for a policy that leads to a denial of an individual's right to effective representation of counsel. We take principal guidance from the leading Supreme Court decisions on state and municipal liability, *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) and *City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), as well as the leading decision considering § 1983 liability of a public defender, *Polk*

County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981).

Polk County held that when an assistant public defender is performing the traditional role of an attorney for a client, the lawyer is not a state actor. *Id.* at 318-19, 102 S.Ct. 445. The case left open the possibility, however, that there may be liability for "administrative and possibly investigative functions." *Id.* at 324-25, 102 S.Ct. 445.

The plaintiff in this case is Roberto Hernandez Miranda. He was convicted of capital murder and served fourteen years in prison until a Nevada state court overturned his conviction in collateral-review proceedings. The Nevada court held that he was not provided effective assistance of counsel because the assistant public defender failed to investigate the case. The state declined to reprosecute.

Miranda then filed this action in federal district court against the individual assistant public defender who had represented him, Thomas Rigsby; the head of the Clark County Public Defender's Office, Morgan Harris; and Clark County, Nevada. The district court dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted.

According to the complaint, Miranda truthfully maintained his innocence, and he provided Rigsby with a list of forty witnesses who could provide information on who actually committed the crime. Rigsby, fresh out of law school and an assistant public defender for a little over a year, had never tried a murder case, much less a capital case. He interviewed only three of the witnesses Miranda had listed and subpoenaed none for trial. Miranda alleges conduct that fell far short of the minimal requirements of effective representation.

In addition, the complaint alleges Rigsby's representation of Miranda was doomed to failure because of two policies promulgated by Harris as the head of the Office of Public Defender. The first was a policy of administering a lie detector

test to all defendants and allocating minimal resources for preparation of defense to those clients who appear guilty because they failed the polygraph. The plaintiff claims that this policy violates the basic dictates of *Gideon* v. *Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), to provide all defendants with effective counsel regardless of guilt or innocence. *Id.* at 344-45, 83 S.Ct. 792. The second policy was to assign the least-experienced lawyers on the staff to capital cases without training or experience in the special demands of such cases. Plaintiff maintains that such a policy constitutes a lack of training so severe as to establish a "deliberate indifference" to a defendant's constitutional rights. *City of Canton,* 489 U.S. at 388-89, 109 S.Ct. 1197. Plaintiff alleges that Harris, as a policymaker for the county, made a deliberate choice to follow this course of action rather than to implement an alternative policy, and that the county thus violated Miranda's constitutional rights. *Id.*

Thus, contrary to the suggestions of my dissenting colleagues, the complaint effectively alleges that Harris made no particularized decisions through the exercise of independent professional judgment in the defense of a client. The complaint expressly states that "Harris, as a policy maker[ ] for the Clark County Public Defender's Office and Clark County, Nevada, ... allocate[d] investigative and defense resources based upon a defendant's performance on a polygraph examination" [Complaint ¶ 121] and "assign[ed] inexperienced and untrained attorneys to capital and other felony cases [Complaint ¶ 138]," which policy, custom or practice "was ... deliberately indifferent to, ... and in callous disregard for, Mr. Miranda's federal constitutional rights, including, but not limited to, his rights to the effective assistance of counsel." Complaint ¶ 138; *see also id.* ¶ 121.

The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) as failing to state a claim upon which relief could be granted against any of the defendants. A three-judge panel of this court affirmed. *Miranda v. Clark*

County, 279 F.3d 1102, 1112 (9th Cir.2002). We affirm as to Rigsby and reverse as to Harris and Clark County.

Key to our review is the stricture that when reviewing a dismissal of a complaint under Rule 12(b)(6), all allegations are to be considered in a light most favorable to the plaintiff. Gone is any heightened pleading requirement that may have influenced the district court's disposition of the case. *Leatherman v. Tarrant County NICU,* 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); *Galbraith v. County of Santa Clara,* 307 F.3d 1119, 1121(9th Cir.2002). We therefore consider the allegations of the complaint as they relate first to the conduct of the individual assistant public defender representing Miranda, and then as they relate to the Public Defender, Harris, alleged to be the policy-maker for Clark County in the allocation of public resources for criminal defense.

The Claim Against the Assistant Public Defender

According to the allegations of the complaint, the conduct of Rigsby was well below the accepted standard of representation of a capital defendant. Given a client who had pled innocent and provided the names of dozens of witnesses who could provide information about the client's innocence and the guilt of the actual perpetrator, the lawyer did essentially nothing. He subpoenaed no witnesses and mounted no defense. We assume, for purposes of this case, his conduct was deficient and to the detriment of his client.

The issue before us, however, is whether in providing inadequate representation to this defendant, Rigsby was acting on behalf of the Clark County government, so as to become a state actor within the meaning of § 1983. He was, no doubt, paid by government funds and hired by a government agency. Nevertheless, his function was to represent his client, not the interests of the state or county. The result reached by both the district court and the three-judge panel in this case, in holding he was not a state actor, is required by the Supreme Court's

decision in *Polk County.* Rigsby had assumed his role as counsel and thus had begun to perform a "lawyer's traditional functions." *Polk County,* 454 U.S. at 325, 102 S.Ct. 445. The Court in *Polk County* found that a public defender representing a client in the lawyer's traditional adversarial role was not a state actor. *Id.* The Court did not predicate its holding on whether the lawyer was in fact exercising "independent judgment." *Id.* at 324-25, 102 S.Ct. 445. Rather, it emphasized that it is the traditional lawyer role that controls. *Id.* at 322 n. 13, 324 n. 17, 325, 102 S.Ct. 445; *Georgia v. McCollum,* 505 U.S. 42, 54, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) (holding that it is the "nature and context of the function" that is determinative).

It does not matter that Rigsby was employed by a public agency. "Except for the source of payment, ... the duties and obligations are the same whether [Rigsby was] privately retained, appointed, or serving in a legal aid or defender program." *Polk County,* 454 U.S. at 318, 102 S.Ct. 445 (internal quotation marks and citation omitted). In that traditional role, Rigsby was acting under the ethical standards of a lawyer-client relationship. He was "[h]eld to the same standards of competence and integrity as a private lawyer." *Id.* at 321, 102 S.Ct. 445. We therefore affirm the district court's dismissal of the complaint against the Assistant Public Defender, Rigsby, on the ground that, as a matter of law, he was not a state actor.

The Claim Against Harris, the County Public Defender

The situation with respect to Harris, the administrative head of the County Public Defender's Office, is different. Insofar as this case is concerned, he was not acting under any of the ethical standards of the lawyer-client relationship to which Rigsby was bound. The nature and context of Harris's function was administrative. He was, according to the complaint, acting solely as the administrative head of the agency, responsible for allocating the office's finite resources. Also according to the complaint, he instituted certain policies as part of his

administrative functions that resulted in the miscarriage of justice represented by the plaintiff's death sentence and murder conviction. We deal with each of these policies in turn.

The Polygraph Policy

The policy in question, for purposes of this appeal, is an alleged policy that subjected each client to a polygraph test and then allocated the resources of the office according to the result of that test. According to the complaint, "if a client failed a polygraph examination, as determined by the subjective assessment of the polygraph examiner, minimal investigation would be conducted and a limited defense would be provided." Thus, if a client appeared on the basis of a polygraph to be lying about his innocence, he would be provided minimal resources to develop a defense. Construed in a light most favorable to the plaintiff, this allegation means that those clients who claimed innocence, but appeared to be guilty, were provided inadequate resources to mount an effective defense.

In evaluating the viability of the claim, we first must determine whether Harris's implementation of such a standard constitutes state action for purposes of § 1983. As we have seen, Rigsby, in undertaking the actual defense of Miranda, entered into an attorney-client relationship that placed him in a role that exempts him from liability under § 1983 as a state actor. Harris, however, is alleged to have been acting as the administrative head of the office in determining how the resources of Clark County would be distributed.

In allocating the county's funds, Harris was performing essentially an administrative role on behalf of Clark County. It was a function similar to that performed by the head of every government administrative office. *See, e.g.*, Nev.Rev.Stat. chs. 180.080, 260.010,-.040,-.070,-.075 (requiring of state and county public defenders expenditure reports and providing for institution and regulation of public defender offices). It therefore materially differs from the relationship inherent in a public defender's representation of an individual client. *Polk*

County, 454 U.S. at 322 n. 13, 324-25, 102 S.Ct. 445. The conduct alleged falls within the type of administrative action adumbrated by the Supreme Court in *Polk County,* when it recognized the possibility that a public defender's "administrative and possibly investigative functions" would constitute state action. *Id.* at 325, 102 S.Ct. 445; *see also McCollum,* 505 U.S. at 54, 112 S.Ct. 2348 (reaffirming that the Public Defender may be a state actor with respect to administrative or investigatory functions). We thus conclude that Harris was acting on behalf of Clark County in determining how the overall resources of the office were to be spent, and he qualifies as a state actor for purposes of § 1983.

That conclusion also is mandated by principles enunciated in *Monell,* in which the Court held that counties and municipalities are amenable to § 1983 liability for constitutional deprivations resulting from application of governmental custom or policy. The resource allocation policy alleged in this case constitutes a viable claim and subjects Harris to suit as a policymaker on behalf of Clark County. *Monell,* 436 U.S. at 690-91, 694, 98 S.Ct. 2018.

The remaining question is whether the alleged policy resulted in deprivation of the plaintiff's constitutional rights to effective representation of counsel. That constitutional guarantee is of effective representation of all defendants, regardless of guilt or innocence. *See Gideon,* 372 U.S. at 344, 83 S.Ct. 792; *see also Holloway v. Arkansas,* 435 U.S. 475, 489, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). Here, according to the plaintiff, if the criminal defendant appeared on the basis of the polygraph test to be guilty, the office sharply curtailed the quality of the representation by limiting the investigatory and legal resources provided. The policy, while falling short of complete denial of counsel, is a policy of deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt. *City of Canton,* 489 U.S. at 389, 109 S.Ct. 1197. This is a core guarantee of the Sixth Amendment and a right so fundamental

that any contrary policy erodes the principles of liberty and justice that underpin our civil rights. *Gideon,* 372 U.S. at 340-41, 344, 83 S.Ct. 792; *Powell v. Alabama,* 287 U.S. 45, 67-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *see also Alabama v. Shelton,* 535 U.S. 654, 122 S.Ct. 1764, 1767, 152 L.Ed.2d 888 (2002).

We recognize, of course, that allocation of resources must be made upon some criteria and not all result in denial of effective representation. We hold only that the determination cannot be based solely or even principally on polygraph results. In so holding, we express no opinion on whether the result of a polygraph test may be used as one of a number of factors employed in determining the extent of investigative resources to devote to a particular defendant's case. We hold only that polygraph results cannot be determinative.

The state suggests that there was no actual prejudice to Miranda in the representation because a Nevada court did not overturn the conviction until fourteen years after the conviction. The state further suggests that it was the death of witnesses rather than the weakness of the state's case in the first place that caused it to decline to reprosecute. These are factual issues, however, that are beyond the purview of our review on a Rule 12(b)(6) dismissal, where only the allegations of the complaint are relevant.

We recognize that the result reached by the district court in dismissing the complaint was in part dictated by heightened pleading standards that are no longer applicable. In *Branch* v. *Tunnell,* 14 F.3d 449, 455 (9th Cir.1994), we ruled such standards may apply after the Supreme Court's decision in *Leatherman* v. *Tarrant County NICU,* 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). However, we recently held that intervening Supreme Court authority has overruled *Branch. See Crawford-El* v. *Britton,* 523 U.S. 574, 595, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998); *see also Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 512-14, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). We have now held that no heightened pleading standard applies

unless required by the Federal Rules of Civil Procedure. *Galbraith,* 307 F.3d at 1124-25.

Under the standard that now applies, the complaint states claims against Harris and the County for the policy of allocating resources on the basis of apparent guilt or innocence. The Rule 12(b)(6) dismissal was inappropriate.

Policy of Assigning Inexperienced Attorneys

The complaint alleges that the County also had a policy of assigning the least-experienced attorneys to capital cases without providing any training, thus demonstrating callous indifference to the defendant's constitutional rights. The County responds that there was no callous disregard of constitutional rights within the meaning of *City of Canton,* because, as a matter of law, attorneys who have graduated from law school and passed the bar should be considered adequately trained to handle capital murder cases.

In *City of Canton,* the Supreme Court held that a failure to train subordinates may result in § 1983 liability where the failure amounts to deliberate indifference to the rights of persons with whom the subordinates come into contact. *City of Canton,* 489 U.S. at 388, 109 S.Ct. 1197. The district court found the allegations of the complaint insufficient under the heightened pleading standard then in effect, relying on *Jones v. Community Redevelopment Agency,* 733 F.2d 646, 649 (9th Cir.1984). The panel essentially applied a similar standard by holding that the assignment of Rigsby to this particular case did not evince a policy of deliberate indifference. *Miranda,* 279 F.3d at 1111. The complaint, however, construed liberally, alleges not merely an isolated assignment of an inexperienced lawyer, but a deliberate pattern and policy of refusing to train lawyers for capital cases known to the county administrators to exert unusual demands on attorneys. Under pleading standards now applicable, *see Galbraith,* 307 F.3d at 1125, the allegations are sufficient to create a claim of "deliberate indifference to

constitutional rights" in the failure to train lawyers to represent clients accused of capital offenses.

The judgment of the district court dismissing the complaint against Rigsby is AFFIRMED. The judgment in favor of defendants Harris and Clark County is REVERSED and the case is REMANDED to the district court for further proceedings. Each party is to bear its own costs.

KLEINFELD, Circuit Judge, concurring in part and dissenting in part, in which SILVERMAN, Circuit Judge, joins as to Part II:

I concur in the majority's conclusion that the district court correctly dismissed Miranda's section 1983 claim against the assistant public defender, Thomas Rigsby, who represented him. In *Polk County v. Dodson,*[1] the Supreme Court held that because an assistant public defender's relationship to his client is substantially identical to a private defense lawyer's, except for how he gets paid, his malpractice, if any, may subject him to a state law malpractice action but is not state action for purposes of section 1983 liability.[2]

I.

I dissent, and would affirm the district court dismissal, as to Morgan Harris, the head of the county public defender's office. The majority ruling does not accurately state what the complaint, upon which this 12(b)(6) ruling must be based, actually says. According to the majority, Miranda pleaded that if a client "appeared on the basis of a polygraph to be lying about his innocence, he would be provided minimal resources."[3]

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[1] *Polk County v. Dodson,* 454 U.S. 312 ,102 S.Ct. 445, 70 L.Ed.2d 509 (1981).

[2] *Id.* at 325-26, 102 S.Ct. 445.

[3] Maj. Op. at 469.

Thus "those clients who claimed innocence, but appeared to be guilty, were provided inadequate resources."[4] And "according to the plaintiff, if the criminal defendant appeared on the basis of the polygraph test to be guilty, the office sharply curtailed the quality of representation."[5]

Actually the complaint does not say or imply any of these things. It says "polygraph examinations were administered to defendants to determine the investigative and defense resources that would be allocated to their case," and that if they failed, minimal resources would be allocated to the case.[6] It goes on to allege Miranda received a "substandard" defense "as a consequence of the Clark County Public Defender's policy of allocating investigative and defense resources based on the client's performance on the polygraph examination."[7]

The majority opinion assumes that Harris used the polygraph to sort out the innocent from the guilty and allocate the most resources to the innocent. No doubt the lawyers in the office tried their hardest for those clients they thought to be truly innocent, but there's no reason to suppose that the polygraph was used to sort out the innocent from the guilty. The complaint doesn't say that. The only mention of guilt is a letter that Rigsby, not Harris, wrote to his investigator, saying that "with such strong evidence of guilt and deception" he would ordinarily require little of the investigator.[8]

Maybe to those who haven't done any criminal defense, it isn't obvious why a polygraph examination would be used except to sort the innocent from the guilty. But to an

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[4] *Id.* at 469-470.

[5] *Id.* at 470.

[6] *See* Complaint at ¶ 117.

[7] *Id.* at ¶ 120.

[8] *Id.* at ¶ 118.

experienced criminal defense lawyer, the distinction between lying and telling the truth is altogether different from (and much more important than) the distinction between guilt and innocence. If the police, prosecutors, and grand jury are doing their screening jobs well, the public defender should have few innocent clients. A criminal defense lawyer occasionally must defend the innocent, a fearfully grave responsibility, but more often defends the guilty. In defending the guilty, criminal defense lawyers perform two noble and just functions: they protect our society from unconstitutional excesses, and they protect criminals from judgments and sentences in excess of what their crimes deserve and ordinarily and properly receive under the law.

The biggest problem criminal defense lawyers face is that their clients often lie to them. Criminal defense clients lie a great deal to their lawyers, they lie to their lawyers more than they lie to the police, they lie about things that don't matter, they lie about things that matter tremendously, they lie in ways that hurt their cases, and most importantly, they lie in ways that disable their lawyers from defending them successfully. Frequently, criminal defendants tell their lawyers some ridiculous fairy tale, even though they have truthfully admitted most or all of what is at issue to the police. It is very difficult for a lawyer to prepare a good defense or negotiate effectively for a plea agreement when the client lies to the lawyer. The polygraph is a high- tech way to scare some of the clients into telling their lawyers the truth, and identifying other clients who won't.

The problem with the lying client isn't that he's guilty. One hopes, if one does criminal defense, that most clients are guilty, because of the terrible risk of an innocent person being convicted. The problem is that the lying client wastes the lawyer's time and his office's resources with a whole lot of rabbit tracks that consume scarce investigative and legal resources but don't lead anywhere. The majority opinion, by carelessly reading into the complaint what isn't there, overlooks

what is there. Miranda accuses Harris of using the polygraph to sort out which clients get more resources allocated to them due to a perception of truthfulness, not because the polygraph indicates guilt.

It may or may not be a good idea to use the polygraph this way. But it is a lawyer's decision – a decision that all criminal defense attorneys make in some form or another. Despite the administrative ring of "allocating resources" this is not an administrative decision like hiring or firing. *Branti* v. *Finkel,*[9] the Supreme Court decision subjecting chief public defenders to section 1983 liability in some cases, dealt with a public defender who fired all assistants who, though doing satisfactory work, were Republicans. The Court held that Republican Party affiliation had nothing to do with an assistant public defender's responsibility, "to represent individual citizens in controversy with the State."[10] Because firing Republicans was administrative and was not analogous to what a private lawyer would do in the course of criminal defense work, it amounted to state action.

Unlike firing a public defender due to his party affiliation, sorting out which clients are telling their lawyers the truth, to decide which ones get more attention and which investigative leads deserve more resources, is necessary to effectively represent them. Few things are more central to representing criminal defendants than persuading them to tell their lawyers the truth. Every criminal defense lawyer develops routines, scripts, and props, to convince his clients to move away from the lies they ordinarily tell at the first interview toward the truth. Some traditional routines are "why are you telling me that you weren't even there when you told the police that you were," and "if you lie to me and I get caught with my pants down in front of the jury, you go to jail, not me." The polygraph technique

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[9] 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).

[10] *Id.* at 519., 100 S.Ct. 1287

adopted by this public defender's office, was, so far as the complaint indicates, just such a prop. As such, it falls within the "exercising her independent professional judgment" for which *Polk County* holds that section 1983 liability may not lie,[11] as opposed to such administrative decisions as hiring and firing, which *Branti* holds that it may.[12]

It should also be noted that the complaint nowhere alleges that Harris had a policy of providing lying clients with "ineffective assistance of counsel." The policy as alleged is for providing "minimal investigation" and a "limited defense" due to a polygraph.[13] The 52-page complaint is drafted by able counsel and no doubt would allege a policy of providing ineffective assistance if, within the bounds of Rule 11, it could. But it doesn't. The constitutional floor is not massive or substantial resources, it's effective assistance of counsel, which may or may not correlate with minimal resources. If Harris saw to it that sufficient resources were available to assistants to provide effective assistance of counsel, then minimal resources consistent with that floor would not be unconstitutional. The complaint does not plead that resources for clients who failed the polygraph were inadequate to provide effective assistance of counsel. It does plead that the investigation was "inadequate" and that the defense was "substandard" as a consequence of the polygraph use,[14] but does not use the words of the constitutional formula. The only reasonable inference from the nonuse of the necessary words is that they could not be honestly said.

II.

Finally, I also dissent from the majority's reversal of the district court dismissal of the claim against the County for the

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[11] *Polk County,* 454 U.S. at 324-25., 102 S.Ct. 445.

[12] *Branti,* 445 U.S. at 517-19, 100 S.Ct. 1287.

[13] Complaint at ¶ 117.

[14] *Id.* at ¶ 120.

lawyer assignment policy. The County doesn't have anything to do with assigning work to public defenders and doesn't have anything to do with training or licensing lawyers. The Supreme Court held in *City of Canton, Ohio* v. *Harris*[15] that "a municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under § 1983."[16] A municipal policy or practice such as inadequate police training "may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."[17]

The majority opinion says that "[t]he complaint alleges that the County also had a policy of assigning the least experienced attorneys to capital cases without providing any training."[18] Actually, the complaint doesn't allege that. It says that "[t]he Clark County Public defender's office" had such a policy or practice, which was "established by Morgan Harris" and John Does.[19] There's a big difference, because a senior or supervising attorney's assignment of cases and work within cases to junior lawyers within the office is quintessentially part of his legal representation. Our law clerks will soon be going to work in law firms in which partners, with little or no consultation with their clients, will assign critical work on important cases to them, and the partners will properly regard their assignment and supervision of green associates' work as legal work for which they will bill, as opposed to administrative work, such as hiring new lawyers, for which they will not.

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[15] 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)

[16] *Id.* at 385, 109 S.Ct. 1197 (citing *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658, 694-95, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978))

[17] *Id.* at 388., 109 S.Ct 1187.

[18] Maj. Op. at 471.

[19] Complaint at ¶¶ 134, 138.

There is no reason to think that the Clark County Board of Commissioners, as opposed to the county public defender, has any policy, or is allowed any say, as to which lawyers handle which cases in the public defender's office. The complaint doesn't allege it.

Nor does the complaint allege that the county assigned inexperienced lawyers to try murder cases without assistance. The complaint says that another lawyer, Douglas DeJulio, "assisted Mr. Rigsby at trial, but was not involved in the pretrial investigation or preparation."[20] The complaint doesn't allege any deficiencies in Mr. DeJulio's experience, education, training, and ability. Miranda actually pled that the public defender had a policy of using a lawyer with a year and a half of experience to prepare the case, but rather than send him into the courtroom alone, the office policy provided for experienced counsel to backup the green lawyer and give advice at trial.

Why does the majority claim that this policy by Harris, the county public defender, is "deliberate indifference" to defendants' rights to competent counsel by the County? I don't know, because the opinion doesn't say. The closest it comes to an argument is saying that the County assigned lawyers "without providing any training."[21] I can't make any sense of this. Since when do lawyers get their training from counties? Most of us get our training from accredited law schools. Is the majority suggesting that it is unconstitutional for governments that provide public defenders not to provide them with free continuing legal education? Who knows? So radical a suggestion would require some explanation, and the majority opinion doesn't contain any.

The majority suggests, without troubling to construct an argument, that this case is like *City of Canton,* where the Supreme Court held that a policy of failing to give emergency

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[20] Complaint at ¶ 31.

[21] Maj. Op. at 471.

medical training to police officers could amount to deliberate indifference toward arrestees' rights to emergency medical training.[22] But the case at bar doesn't involve training police; there's no analogy. If municipalities hire inexperienced police and don't provide any training, the police may not get any, except as their experience over the years gives it to them, so one would have to expect grave mistakes in their early years. Police don't necessarily go to police school before getting hired as police. But lawyers do necessarily go to law school (or in some states read law under supervision) before being hired as lawyers. In Nevada, the Board of Governors of the state bar, not counties, determines whom to admit to the practice of law,[23] and the educational requirement to practice law is graduation from a law school accredited by the American Bar Association.[24] Unless the majority opinion means to suggest that the Nevada Supreme Court Rules governing the practice of law are unconstitutional because they allow admitted lawyers to represent clients in any sort of case with no more than the training required by the rules, there is no basis for its reversal of the district court dismissal of the claim against the County.

The majority's reliance on the County's assignment of an inexperienced lawyer and policy of refusing to train lawyers is also surprising in light of the Supreme Court's holding in *United States* v. *Cronic*[25] that ineffective assistance cannot be inferred from assignment of a young inexperienced lawyer to a major felony case, even though he had no criminal experience and had never tried a case to a jury.[26] Similarly, we held in a death

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[22] 489 U.S. at 388, 109 S.Ct. 1197.

[23] NV S.Ct. Rule 49, n.1, *available at* http://www.leg.state.nv.us/CourtRules/SCR. html (last visited Dec. 16, 2002).

[24] *Id.* at Rule 51, n. 3.

[25] 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

[26] *Id.* at 665, 104 S.Ct. 2039.

penalty case, *Ortiz v. Stewart,*[27] that assigning a green lawyer did not, under *Cronic,* constitute ineffective assistance of counsel. We held the same in *LaGrand* v. *Stewart,*[28] another death penalty case, because "it is not the experience of the attorney that is evaluated, but rather, his performance."[29] It does not make sense, in the face of established law holding that assignment to inexperienced counsel with no special training does not support an inference of ineffective assistance even in death penalty cases, for the majority to infer such assignments, made as a matter of policy, do support such an inference. If there were some logic to having it both ways, it would be incumbent on the majority to set it out and distinguish the cases. The sounder position is the one the district court adopted, that the complaint does not state a cause of action against the County.

The policies Harris, as County Public Defender, is alleged to have adopted – using polygraph examinations of clients to decide how extensively defense resources would be allocated to them and assigning young lawyers to work up murder cases for trial and to try them with experienced lawyers assisting them – may or may not be a good idea. But as the Court in *Cronic* said, "We do not pass on the wisdom or propriety of appointing inexperienced counsel in a case such as this," because "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled."[30] While these policies may or may not be wise, they are not unconstitutional.

Criminal defense lawyers ought to have their eyes on the jury. Heavy-handed regulation of public defenders' offices such as we engage in today forces them instead to be looking over

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[27] 149 F.3d 923, 933 (9th Cir.1998).

[28] 133 F.3d 1253, 1275 (9th Cir.1998).

[29] *Id.*

[30] *Cronic,* 466 U.S. at 665, 104 S.Ct. 2039.

their shoulders at us. They know better than we do how to defend all their clients.

SILVERMAN, Circuit Judge, with whom SNEED and T.G. NELSON, Circuit Judges, join, concurring in part and dissenting in part:

I agree with the majority that by virtue of *Polk County* v. *Dodson,* 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509. (1981), the conduct of Assistant Public Defender Thomas Rigsby cannot be considered "state action" for § 1983 purposes. As I see it, however, this is also the case with Public Defender Morgan Harris. I would affirm the dismissal of the complaint against him as well.

I read *Polk County* to hold that a public defender – be it an assistant P.D. or the head of the office – does not act under color of state law when exercising independent professional judgment in connection with the defense of a client. *Id.* at 324-325, 102 S.Ct. 445. In my view, a decision by the public defender as to which of his or her assistants to assign to a particular client, in a particular case, is directly related to the defense of the client. Therefore, under the rationale of *Polk County,* it is not state action. The same goes for the use of a polygraph examination and other aspects of trial preparation. These are decisions pertaining to the client's representation, and consequently, are not made under color of state law. Such decisions are in contrast to, say, a public defender's discrimination in hiring, or sexual harassment of an employee – conduct having nothing to do with the defense of a client. Such non-case-related decisions are not protected by *Polk County.*

As for the claim against Clark County, I agree with Judge Kleinfeld and join that portion of his partial concurrence, partial dissent.

APPENDIX B

United States Court of Appeals,

Ninth Circuit.

Roberto Hernandez MIRANDA, Plaintiff-Appellant,

v.

CLARK COUNTY, NEVADA; Morgan Harris; Thomas Rigsby, Defendants-Appellees.

No. 00-15734.

Argued and Submitted Oct. 18, 2001.

Filed Feb. 8, 2002.

Before: SNEED, TROTT, and TALLMAN, Circuit Judges.

TROTT, Circuit Judge:

OVERVIEW

We are asked to decide whether an indigent client in a criminal case may resort to the federal civil rights statute, 42 U.S.C. § 1983, to challenge the manner in which he was represented by his public defender. We answer that question in the negative.

Roberto Hernandez Miranda ("Miranda") brought this action under § 1983 against Clark County, Nevada (the "County"), the County's public defender, Morgan Harris ("Harris"), and deputy public defender, Thomas Rigsby ("Rigsby"), alleging the deprivation of his constitutional rights to confrontation, due process, and effective assistance of counsel. The district court dismissed the claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

On appeal, Miranda contends the district court (1) erred in determining that Rigsby did not act under color of state law as required by § 1983, and (2) misapplied the pleading

requirements in holding that he failed to state a claim against Harris and the County for alleged unconstitutional policies.

We have jurisdiction over this timely appeal pursuant to Fed.R.Civ.P. 54(b). We hold that Rigsby, in defending Miranda, performed the traditional functions of a defense attorney and, thus, did not act under color of state law for purposes of § 1983. Miranda's claims against the remaining defendants fail because he attacks policies that are not unconstitutional. Accordingly, we affirm the district court's dismissal of Miranda's claims against his former public defender, the public defender's supervisor, and the county agency that employed them.

BACKGROUND

On April 1, 1982, following a homicide investigation by the Las Vegas Metropolitan Police Department, Miranda was charged with the following crimes in connection with the death of Manuel Torres: first degree murder with a deadly weapon; robbery with a deadly weapon; and larceny. Miranda was represented in his capital case by deputy public defender Rigsby, a recent law school graduate who passed the Nevada bar in late 1980 and began work in the County public defender's office in February of 1981. Rigsby had no prior experience defending a murder suspect.

Miranda vigorously maintained his innocence from the outset, and supplied Rigsby with the names of numerous people who could have testified on his behalf or provided exculpatory evidence. According to Miranda's complaint, Rigsby's approach to contacting or subpoenaing these potential defense witnesses and investigating other leads ranged from the halfhearted to the nonexistent. Miranda alleged that "[o]ut of more than *forty* possible witnesses, Rigsby interviewed *three,* and did not manage to serve a subpoena on a single witness." Miranda was equally critical of Rigsby's performance during trial, characterizing it as a succession of missed opportunities to exonerate Miranda and incriminate others. In August 1981, a

jury found Miranda guilty of all charges. He was later sentenced to death.

Miranda continued to contest his conviction and sentence while in jail, filing several petitions for writs of habeas corpus. In February 1996, his sustained campaign for postconviction relief finally bore fruit when the Nevada Supreme Court overturned his conviction due to the ineffectiveness of Rigsby's counsel. The State declined to re-prosecute, and Miranda was released from jail.

Later, Miranda brought suit against Rigsby, Harris, and the County, for alleged violations of his constitutional rights under § 1983.[1] In his action against Rigsby, Miranda claimed that Rigsby's failure to adequately investigate, prepare for, and defend his case demonstrated a deliberate indifference to and callous disregard for Miranda's constitutional rights, including his rights to confrontation, compulsory process, due process and the effective assistance of counsel. Rigsby moved to dismiss, claiming he did not act under color of state law and, thus, could not be liable under § 1983. The district court agreed, and dismissed Miranda's claim.

In his actions against the remaining defendants, Harris and the County, Miranda asserted claims for municipal liability under *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and *City of Canton* v. *Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). In his *Monell* action, Miranda asserted that Harris, as the County's official policymaker, instituted a policy for the public defender's office whereby resources were allocated to a criminal defendant's case based on the defendant's performance on a

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[1] Miranda's original complaint named additional defendants and additional causes of action that are not at issue on this appeal. Remaining before the district court are claims against the investigating detectives for the allegedly negligent police investigation that resulted in the arrest and prosecution of the wrong man.

polygraph test. Fewer resources were allocated to the investigation for and representation of a criminal defendant whose polygraph results suggested guilt. Miranda contended that because he performed poorly on his polygraph, the public defender's office, pursuant to the alleged policy, provided a "minimal and inadequate investigation" and "substandard defense" which denied his rights to due process, confrontation, effective assistance of counsel, and a fair trial.

In his second action, Miranda contended that the public defender's office had a practice of assigning inexperienced attorneys to defend defendants charged with serious felonies. The County's failure to train adequately its inexperienced attorneys, says Miranda, evinced deliberate indifference to Miranda's constitutional right to the effective assistance of counsel, and constituted actionable conduct under the *City of Canton* line of cases.

The district court granted Harris's and the County's motions to dismiss on the grounds that Miranda alleged insufficient facts to support his claims. Because causes of action remained between Miranda and other parties not relevant to this appeal, he moved for certification under Fed.R.Civ.P. 54(b) to expedite the appeal of his dismissed claims against Rigsby, Harris, and the County. The district court granted the motion, and this appeal followed.

STANDARD OF REVIEW

We review de novo the district court's orders to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim. *See Epstein* v. *Wash. Energy Co.*, 83 F.3d 1136, 1139 (9th Cir.1996). While we accept as true all material allegations and construe them in the light most favorable to Miranda, conclusory allegations of law and unwarranted inferences will not defeat a motion to dismiss for failure to state a claim. *See id.* at 1140.

DISCUSSION

I. Because Rigsby Did Not Act Under Color of State Law, The District Court Properly Dismissed Miranda's § 1983 Claim Against Him

To state a claim against Rigsby under § 1983, Miranda must allege two essential elements: (1) deprivation of a right secured to him by the Constitution or laws of the United States; and (2) that Rigsby committed the deprivation while acting under color of state law.[2] *See West* v. *Atkins,* 487 U.S. 42, 48-49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *Ove* v. *Gwinn,* 264 F.3d 817, 824 (9th Cir.2001). A person acts under color of state law only when exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States* v. *Classic,* 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941); *McDade* v. *West,* 223 F.3d 1135, 1139-40 (9th Cir.2000).

In determining whether Rigsby acted under color of state law, we are guided by the Supreme Court's decision in *Polk County* v. *Dodson,* 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). There, the Court took a "functional approach," holding that whether a public defender acts under color of state law in a particular context depends on the nature of the duties he performs. *See Polk County,* 454 U.S. at 319-20, 102 S.Ct. 445. Thus, "a public defender does not act under color of state law when performing a lawyer's traditional functions" – e.g., "enter[ing] 'not guilty' pleas, mov[ing] to suppress State's

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[2] Title 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

evidence, object[ing] to evidence at trial, cross-examin[ing] State's witnesses, and mak[ing] closing arguments." *Id.* at 325, 320, 77 S.Ct. 1064. The Court reasoned that a public defender serves his traditional, and primary, role by "advancing the undivided interests of his client," an "essentially[ ] private function, traditionally filled by retained counsel, for which state office and authority are not needed." *Id.* at 318- 19, 77 S.Ct. 1064 (internal quotations omitted).[3]

Because the public defender in *Polk County* functioned as the State's adversary, "exercis[ing her] independent judgment on behalf of the client," she did not act under color of state law and, thus, was not liable under § 1983. *Polk County,* 454 U.S. at 321, 102 S.Ct. 445.

The Supreme Court has not passed on whether a public defender's pre-trial decisions involving the interview and subpoenaing of witnesses are traditional functions and, thus, shielded from liability under § 1983. The Court, however, has considered the liability of state prosecutors under § 1983 for similar actions. In so doing, the Court has repeatedly applied its functional analysis which "looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley* v. *Fitzsimmons,* 509 U.S. 259, 269, 113 S.Ct. 2606, 125

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[3] The Supreme Court elaborated on this same point in *Ferri* v. *Ackerman,* 444 U.S. 193, 100 S.Ct. 402, 62 L.Ed.2d 355 (1979):

> [T]he primary office performed by appointed counsel parallels the office of privately retained counsel....[H]is duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.

Id., 444 U.S. at 204, 100 S.Ct. 402.

L.Ed.2d 209 (1993) (quoting *Forrester* v. *White*, 484 U.S. 219, 229, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988)).

In *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), for example, the Court addressed the liability of state prosecutor Pachtman under § 1983 for his alleged knowing use of false testimony and suppression of exculpatory evidence in the prosecution and conviction of a criminal defendant. The Court held that "[Pachtman's] activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Imbler*, 424 U.S. at 430, 96 S.Ct. 984. The Court's holding contemplated clearly a lawyer's conduct outside the courtroom: "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution .... [including] which witnesses to call .... [and] the obtaining, reviewing, and evaluating of evidence." *Id.* at 431 n. 33, 96 S.Ct. 984.

The Court made a similar observation in *Buckley:* "acts undertaken by a prosecutor *in preparing for the initiation of judicial proceedings or for trial,* and which occur in the course of his role as an advocate for the State" – including *"evaluating evidence and interviewing witnesses as he prepares for trial"*–"are entitled to the protections of absolute immunity." *Buckley,* 509 U.S. at 273, 113 S.Ct. 2606 (emphasis added); *see also Kalina* v. *Fletcher,* 522 U.S. 118, 129, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997); *Burns* v. *Reed,* 500 U.S. 478, 487, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991).

Our task, then, is to determine whether Rigsby's decisions concerning whom to interview, investigate, and subpoena fall under the rubric of a lawyer's "traditional functions." Miranda urges us to hold that they do not, arguing that Rigsby functioned as a state administrator or investigator, rather than a private attorney. The following language from *Polk County* serves as the foundation for Miranda's strained argument:

> In concluding that [the public defender] did not act under color of state law in exercising her independent professional judgment in a criminal proceeding, we do not suggest that a public defender never acts in that role. In *Branti* v. *Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), for example, we found that a public defender so acted when making hiring and firing decisions on behalf of the State. *It may be* – although the question is not present in this case – *that a public defender also would act under color of state law while performing certain administrative and possibly investigative functions.*

Polk County, 454 U.S. at 324-25, 102 S.Ct. 445 (emphasis added). Miranda contends the Supreme Court carved out an exception for civil liability when public defenders perform administrative and investigative tasks. Hence, he argues, Rigsby's "administrative" decision not to assign an investigator to "locate, interview, or subpoena" numerous witnesses, and his failure to properly "investigate" potential witnesses fall under the putative exceptions in *Polk County.*

Since *Polk County,* the Supreme Court has not confirmed whether civil liability exists for a public defender's administrative or investigative functions, let alone defined the contours of those functions. However, we need not address these issues today because we hold that whatever functions the Supreme Court had in mind, they were not those performed by Rigsby.

We observe, first, that Rigsby, though employed by the County, functioned as its adversary; he acted at all times on behalf of Miranda. Rigsby's conduct was not, nor could it have been, dictated by any State-imposed guidelines.[4] *See id.* at 321,

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[4] The ABA Code of Professional Conduct provides: "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." DR 5-107(B) (2001). Nevada has adopted this rule verbatim in its Code of Professional

77 S.Ct. 1064. Rather, his decisions to assign *vel non* an investigator to track down particular leads or witnesses advanced the interests of only one party – Miranda. Rigsby's conduct is, thus, easily distinguished from that of the public defender in *Branti* v. *Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), who was deemed a state actor when making personnel decisions for the public defender's office. Branti was sued in his role as administrator, not lawyer. His hiring and firing decisions served the interests of his county employer and were the type of conduct easily amenable to administrative direction. Rigsby's actions were not administrative in these ways.

To accept Miranda's position to the contrary would require our turning a blind eye to common sense in evaluating the public defender's function. It cannot be seriously disputed that Rigsby's pre-trial decisions confront every criminal defense attorney, whether privately retained or publicly assigned, during the course of representation. It is equally evident that Rigsby's pre- trial decisions objected to by Miranda were just as "traditional," and essential to Miranda's defense, as those performed during trial. One doesn't have to be steeped in the works of Erle Stanley Gardner to recognize that a lawyer is hired as much for the exercise of his pre-trial, professional judgment concerning the evaluation and interviewing of witnesses, as for his prowess in front of the judge and jury. Miranda characterizes Rigsby's conduct as "administrative" or "investigative." But if *Polk County* teaches us anything, it instructs us to focus on Rigsby's functions, not Miranda's dubious labels of them. *Cf. Ybarra* v. *Reno Thunderbird Mobile Home Village,* 723 F.2d 675, 679 (9th Cir.1984) (holding "insofar as [the district attorney's] decision to release the home can be characterized as investigative" or administrative, the decision was made "pursuant to the preparation of the

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Conduct. *See* Nev. Supreme Court Rule 188.3 (2001).

prosecutor's case" and, thus, "warrants absolute immunity"). Heeding that lesson, we hold that Rigsby performed a lawyer's traditional duties in deciding which witnesses to investigate, interview, and subpoena, and which defense leads to pursue. We reject Miranda's arguments to the contrary.

Finally, it may well be that Rigsby's representation was wholly inadequate, but § 1983 does not create a remedy for all conduct that deprives a person of protected rights; its reach is limited to state action.

Thus, even though the defective performance of defense counsel may cause the trial process to deprive an accused person of his liberty in an unconstitutional manner, *Cuyler* v. *Sullivan,* 446 U.S. 335, 342-345, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), the lawyer who may be responsible for the unconstitutional state action does not himself act under color of state law within the meaning of § 1983. *Polk County* v. *Dodson,* 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981).

Briscoe v. *LaHue,* 460 U.S. 325, 329 n. 6, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). Thus, even under our liberal standard of review, Miranda's complaint cannot support a finding that Rigsby acted under color of state law.

II. Miranda Fails To Allege the Existence of An Actionable Policy Against Harris and the County

A. Liability Under Monell and City of Canton

The parties agree that *Monell* and its progeny govern Miranda's claims of municipal liability under § 1983. Under this line of decisions a local government may be liable only where the municipality *itself* causes the constitutional violation. *See Bd. of the County Comm'rs* v. *Brown,* 520 U.S. 397, 403, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). Respondeat superior and vicarious liability are not cognizable theories of recovery against a municipality. *See id; Duvall* v. *County of Kitsap,* 260 F.3d 1124, 1141 (9th Cir.2001). Instead, a *Monell* claim exists only where the alleged constitutional deprivation was inflicted

in "execution of a government's policy or custom." *Monell,* 436 U.S. at 694, 98 S.Ct. 2018.

A municipality's policy of inaction – e.g., the failure to train its employees – may also constitute grounds for suit where the failure "amounts to deliberate indifference to the rights of persons" impacted by the inaction. *City of Canton,* 489 U.S. at 388, 109 S.Ct. 1197. *See also Oviatt* v. *Pearce,* 954 F.2d 1470, 1474 (9th Cir.1992). Deliberate indifference to a person's constitutional rights occurs when the need for more or different action, "is so obvious, and the inadequacy [of the current procedure] so likely to result in the violation of constitutional rights, that the policymakers ... can reasonably be said to have been deliberately indifferent to the need." *Oviatt,* 954 F.2d at 1477-78 (quoting *City of Canton,* 489 U.S. at 390, 109 S.Ct. 1197). *See also Bd. of the County Comm'rs,* 520 U.S. at 410, 117 S.Ct. 1382 ("'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."). The rationale is that local governmental inaction rising to the level of deliberate indifference reflects a conscious choice to violate the victim's rights and, thus, represents an actionable city "policy" under § 1983. *City of Canton,* 489 U.S. at 389, 109 S.Ct. 1197; *Lee* v. *City of Los Angeles,* 250 F.3d 668, 681 (9th Cir.2001). For liability to attach, a *Monell* plaintiff must establish the alleged inaction is so "closely related to the ultimate injury" as to constitute the "moving force behind" it. *City of Canton,* 489 U.S. at 391, 389, 109 S.Ct. 1197. *See also Lee,* 250 F.3d at 681 ("[A] plaintiff must show that his or her constitutional 'injury would have been avoided' had the governmental entity properly trained its employees.") (citations omitted).

Miranda alleges that the remaining appellees, Harris and the County, enacted two policies that violated his Sixth Amendment right to effective assistance of counsel. *See Strickland* v. *Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Though the district court based its dismissal on

pleading infirmities, we are not bound by the court's reasoning and may affirm on any ground having support in the record. *See Tyler* v. *Cisneros,* 136 F.3d 603, 607 (9th Cir.1998). Assuming, as we must on an appeal of a district court's dismissal under Fed.R.Civ.P. 12(b)(6), that both alleged policies existed, we hold that neither policy, as alleged, is unconstitutional. The district court, thus, properly dismissed these claims.

B. It is Not Unconstitutional For the County to Base Its Allocation of Resources on the Results of a Criminal Defendant's Polygraph Test

In his complaint, Miranda alleged the existence of a County policy whereby the public defender's office considers a criminal defendant's performance on a polygraph test to decide what resources will be expended on that defendant's behalf. Miranda contended he "allegedly performed poorly on the polygraph" and "[c]onsequently, minimal investigation was performed prior to and during" trial. The resulting, allegedly inadequate representation violated his Sixth Amendment rights, and led to his wrongful conviction, death sentence, and nearly fourteen year imprisonment. This policy, he continues, is actionable under *Monell.*

Miranda concedes that the County public defender's office does not violate the Constitution by allocating different amounts of resources to the defense of different criminal defendants. Nor does Miranda contest the validity of apportioning resources based on the significance of a particular case or its anticipated success at trial. Miranda argues, however, that the County's policy of using a polygraph to help make these decisions violated the Constitution when it deprived him, as it allegedly did here, of his Sixth Amendment right to effective assistance of counsel.

Yet, Miranda fails to suggest *why* the use of a polygraph transforms what Miranda admits to be a constitutionally valid policy – the public defender's discretionary apportionment of resources – into one ripe for *Monell* liability. A polygraph test

is just another factor – like, e.g., the existence of inculpatory evidence, the applicability of favorable case law, a defendant's criminal history – which can help a public defender to plan his client's defense and to predict the possible outcome of the case. As noted above, Miranda admits that a public defender's office has the discretion to assess the priorities among its cases and allocate resources as it sees fit.

Furthermore, the Supreme Court has held that "[i]ndividual jurisdictions ... may reasonably reach differing conclusions as to whether polygraph evidence should be admitted." *United States* v. *Scheffer,* 523 U.S. 303, 312, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). In this Circuit, "[t]he admission of unstipulated polygraph evidence at sentencing is left to the sound discretion of the trial court." *United States* v. *Jordan,* 256 F.3d 922, 933 n. 7 (9th Cir.2001) (internal quotations omitted); *United States* v. *Cordoba,* 104 F.3d 225, 228 (9th Cir.1997) (holding that *Daubert* v. *Merrell Dow Pharms.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), overruled any *per se* rule preventing the admission of unstipulated polygraph evidence). If polygraph *evidence* may be used at trial, then its use by the County to assist the decision-making process here under review is clearly not constitutionally suspect. Moreover, it is common knowledge that federal agencies such as the Federal Bureau of Investigation and the Central Intelligence Agency routinely use the polygraph as a tool in many different arenas, as may private employers in the limited circumstances outlined in the Employee Polygraph Protection Act of 1988. *See* 29 U.S.C. § 2006 (2001). Accordingly, we hold that the County public defender's use of a polygraph in this context is constitutionally irrelevant. Miranda's *Monell* action against Clark County based on this policy was, thus, properly dismissed.

C. The County's Failure to Train the Attorneys it Assigned to Represent Criminal Defendants is not Actionable Because the Failure Does Not Evince Deliberate Indifference to Their Constitutional Rights

Miranda alleges that Harris and the County deprived him of his Sixth Amendment right to effective assistance of counsel by failing to train the County's deputy public defenders. As noted above, to establish deliberate indifference, "the need for training must be obvious and violation of constitutional rights must be a highly predictable consequence." *Plumeau* v. *Sch. Dist. # 40,* 130 F.3d 432, 439 n. 4 (9th Cir.1997) (citing *Bd. of the County Comm'rs,* 520 U.S. at 410-11, 117 S.Ct. 1382). Rigsby is a law school graduate, a member in good standing of the state bar, and was hired for a deputy public defender position on the basis of his perceived abilities. Accordingly, the County's assignment of him to represent Miranda did not evince deliberate indifference to Miranda's right to effective assistance of counsel. The Sixth Amendment does not guarantee to Miranda, or any criminal defendant, the assistance of Perry Mason. That Rigsby had no previous experience defending a criminal defendant convicted of a serious crime is, without more, of no constitutional moment. *Cf. City of Canton,* 489 U.S. at 390 n. 10, 109 S.Ct. 1197 (holding that a claim might lie where the need to train is "so obvious" that the failure to do so could properly be characterized as "deliberate indifference" to constitutional rights). On these facts, the district court properly dismissed this claim.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Entered and Served:
Mar. 20, 2000]

ROBERTO HERNANDEZ MIRANDA,

CV-S-98-1121-LDG- (RJJ)

Plaintiff,

v.

CLARK COUNTY; et al., **ORDER**

Defendants.

This matter comes before the court on plaintiff's motion for 54(B) certification and request for clarification (#40, response #41). On October 7, 1999, this court granted Morgan Harris' motion to dismiss (#16), Clark County's motion to dismiss (#18), and Thomas Rigsby's motion to dismiss (#19). In its motion to dismiss, Clark County specifically requested dismissal of the conspiracy claim. Plaintiff asks for a clarification as to whether the § 1983 claims for the polygraph and inexperienced attorney policies were also dismissed against Clark County.

Clark County joined in Morgan Harris' motion to dismiss. Plaintiff's complaint alleged that Morgan Harris was the county's policy-maker. The court found that no claim existed against Harris for the alleged defective policies. Therefore, no such claims survived as against Clark County either. See Monell v. New York City Department of Social Services, 436 U.S. 658, 689 (1978) (government unit subject to § 1983

liability only when policy-makers adopted a custom or policy depriving individuals of federal rights).

Plaintiff also requests that the court enter an order granting Rule 54(b) certification by determining that there is no just reason for delay, and entering judgment in favor of Harris, Rigsby and Clark County. Defendants do not oppose this request. The claims against Harris, Rigsby and Clark County are severable from those of the remaining defendants, Leonard and Maddock, and were a major component of plaintiff's action. Accordingly, the court finds that Rule 54(b) certification will aid the expeditious decision of the case, and will grant plaintiff's motion. Accordingly,

IT IS HEREBY ORDERED that the plaintiff's request for a clarification of the court's October 7, 1999, order (#40) is GRANTED. The October 7, 1999, order dismisses the claims against Clark County in their entirety.

IT IS FURTHER ORDERED that plaintiff's motion for Rule 54(b) certification (#40) is GRANTED.

DATED this 17 day of March, 2000.

/s/
Lloyd D. George
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Entered and Served:
Oct. 8, 1999]

ROBERTO HERNANDEZ MIRANDA,

Plaintiff,

CV-S-98-1121-LDG

v.

CLARK COUNTY, NEVADA; MORGAN HARRIS; THOMAS RIGSBY; JOHN DOES I-V; ROBERT LEONARD AND MICHAEL MADDOCK,

ORDER

Defendants.

This matter comes before the court on defendant Morgan Harris' motion to dismiss (#16, Clark County's joinder in motion #18, opposition #26, reply #32, Clark County's and Rigsby's rejoinders in reply #35 and #36), defendant Thomas Rigsby's motion to dismiss (#19, opposition #28, reply #33), defendant Clark County's joinder in Harris' motion to dismiss (#18, opposition #27, reply #35), and defendants Robert Leonard's and Michael Maddock's motion to dismiss (#17, opposition #25, reply #34).

For the court to dismiss a complaint or claims pursuant to Rule 12(b)(6), the court must accept the allegations of the complaint as true and construe them in the light most favorable to the non-moving plaintiff. Conley v. Gibson, 355 U.S. 41, 45

(1957); Sosa v. Hiraoka, 920 F.2d 1451, 1455 (9th Cir. 1990). For the movant to succeed, "it must appear to a certainty that plaintiff will not be entitled to relief under any set of facts that could be proved." Rothman v. Vedder Park Mgt., 912 F.2d 315, 316 (9th Cir. 1990).

I. Background

On August 19, 1982, plaintiff Roberto Hernandez Miranda was found guilty of first degree murder, robbery, and grand larceny by jury in connection with the death of Manuel Torres. Following a separate penalty hearing, the jury imposed the death sentence for Miranda's first degree murder conviction. Miranda v. State of Nevada, 101 Nev. 562, 707 P.2d 1121 (1985). In February 1996, the state district court granted Miranda's petition for post-conviction relief. On September 3, 1996, the state chose not to reprosecute Miranda, and he was released from custody.

In August 1998, Miranda brought this action, under 42 U.S.C. §§ 1983, 1985(3), against Clark County, Nevada; public defender Morgan Harris; and Miranda's trial counsel, deputy public defender Thomas Rigsby; claiming violations of Miranda's First, Fifth, Sixth, and Fourteenth Amendment rights. Miranda also sued defendants Robert Leonard and Michael Maddock, homicide detectives with the Las Vegas Metropolitan Police Department assigned to investigate the case, for failing to disclose exculpatory and impeachment evidence to the defense as required under the holdings of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). Miranda is seeking compensatory damages, punitive damages, and attorneys' fees.

II. Miranda's Factual Allegations

On August 10, 1981, Manuel Torres, a Mexican man who worked at the Stardust, was discovered dead in his apartment by his friend. From a call on the "Secret Witness" hotline on August 11, 1981, Detective Leonard received information that Fernando Cabrera was seen entering a truck that belonged to the

victim. Based on the address provided by the anonymous caller, Leonard intercepted Fernando Cabrera and found the victim's truck nearby. Fernando Cabrera was taken to the police station and questioned through an interpreter on the same day. After the police told Fernando Cabrera that his fingerprints were found on the victim's truck, Cabrera admitted to having driven the truck under the instruction of "Roberto."

Fernando Cabrera's brother and sister-in-law went to the Las Vegas Metropolitan Police Department, and told the police that Cabrera had admitted to his lover and roommate that he had killed a Mexican man who worked at the Stardust Hotel. Fernando Cabrera's sister-in-law also informed the police that Cabrera was extremely violent and had threatened his brother not to get involved. Allegedly, neither these statements nor the identities of the witnesses were disclosed to the defense.

On October 19, 1981, Fernando Cabrera identified a photograph of Miranda as the murderer. Among the patent prints collected, a thumb print on a broken glass in the victim's apartment matched Miranda's.

On January 26, 1982, a Los Angeles detective called detective Leonard and informed him that a David Cabrera, arrested and charged for a Los Angeles burglary, claimed to have information regarding Miranda's involvement in the murder. David Cabrera was interviewed by Leonard and received favorable consideration for his information at his sentencing for the burglary charge. This fact was allegedly not revealed to the defense.

The public defender's office of Clark County assigned Thomas Rigsby to represent Miranda. Rigsby, who had practiced law for less than two years, had not tried a murder case before this time. According to the complaint, Rigsby interviewed three out of some forty potential witnesses, and failed to subpoena any of the witnesses willing to testify regarding Miranda's innocence. Miranda also asserts that

Rigsby failed to effectively cross-examine the key prosecution witnesses, David and Fernando Cabrera.

In his complaint, Miranda alleges that Clark County and the Public Defender's Office had a policy, custom, or practice of (1) assigning inexperienced attorneys to represent defendants with serious felonies, including first degree murder; and (2) devoting minimal resources to investigate and defend criminal charges against Hispanic and African-American defendants, clients who were not members of the Church of Jesus Christ of Latter-Day Saints, and clients who failed polygraph examination.

Miranda alleges that Clark County's policy of devoting minimal resources to investigate and defend clients who failed polygraph test is evidenced in a memorandum from Rigsby to Ellis, the investigator assigned to Miranda's case by the public defender's office. The memorandum reads as follows:

> Bob, I've enclosed defendant's PH meo. Besides this evidence, defendant's fingerprints were found in the deceased's apartment and defendant flunked Ray's poly (-20). However, defendant strongly denies any involvement. With such strong indicia of guilt and deception on defendant's part, I ordinarily wouldn't have you do much investigation. But it is my strong opinion that, if defendant is convicted, he will receive the death penalty. Therefore, in addition to a trip to CA (which I will make), I'd like you to investigate a few loose ends and serve a few subpoenas.

Complaint ¶ 118, at 35.

III. Allegations of policy of discrimination in applying resources to certain cases

Miranda brought this action under 42 U.S.C. § 1983 against Clark County alleging that Clark County has a policy, custom, or practice of allocating minimal investigative and defense resources if a defendant failed the polygraph test. Miranda further alleges that Clark County and Harris, as final policymaker, had a policy of assigning inexperienced or

inadequately trained attorneys to defendants charged with felony, thus, depriving them of rights secured under the Constitution. Harris argues that because the public defender does not act under color of state law, any § 1983 claims against him must fail.

While municipalities are amenable to § 1983 causes of action for constitutional deprivations visited pursuant to "custom" formalized through the body's official decision-making channels, Monell v. New York City Dept. of Social Services, 436 U.S. 658, 689 (1978), "there must be an affirmative link between the policy and the particular constitutional violation alleged[; p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident included proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." Id. at 823-24. Moreover, the Ninth Circuit had held that a plaintiff must allege with at least some degree of particularity overt acts which defendants engaged in to support a plaintiff's section 1983 claims. Jones v. Community Redevelopment Agency of the City of Los Angeles, 733 F.2d 646, 649 (9th Cir. 1984).

Here, Miranda fails to allege facts showing an affirmative link between the policy of devoting minimum resources to those who fail a polygraph test, are minorities, or not members of the Church of Jesus Christ of Latter-Day Saints, and the constitutional violations asserted. Nothing in Rigsby's memorandum establishes any such nexus. Indeed, the memorandum enumerated three points of evidence suggesting Miranda's guilt: PH meo, Miranda's fingerprints found in victim's apartment, and the flunked polygraph. At most, Rigsby's memorandum suggests no one but Rigsby behind the decision to minimize the investigation. The other allegations supporting the Monell claims are conclusory. Thus, Miranda fails to state a claim under Section 1983 that would impose liability on Clark County or defendant Harris as a policymaker.

IV. Alleged policy of assigning inexperienced attorneys

Only where a municipality's failure to train its employees amounted to "deliberate indifference" to the constitutional rights of its people would such policy or custom became actionable under Section 1983. City of Canton v. Harris, 489 U.S. 378, 388 (1989). That a particular official may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the official's shortcomings may have resulted from factors other than a faulty training program. Id. at 388-91. Furthermore, to support an allegation of deliberate indifference in training, a plaintiff must allege that the deficiency in training actually caused the employees "indifference" to plaintiff's needs, and that the injury would have been avoided had the employee been trained under a program that was not deficient in the identified respect. Id. at 391-92 (to adopt "lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983 [and] engage the federal courts in an endless exercise of second-guessing municipal employee-training programs as . . . well as one that would implicate serious questions of federalism.")

Miranda's [sic] alleges insufficient facts to support his claim that the public defender's office has a policy of assigning inexperienced or inadequately trained attorneys to defendants charged with serious felony. Nor does Miranda adequately allege that inadequate training caused Rigsby's "indifference" to Miranda's rights. Thus, while Miranda's allegations regarding the ineffectiveness of Rigsby's defense during the trial could conceivably state a claim for a malpractice lawsuit, they do not state one for "deliberate indifference" under § 1983.

V. Claims of inadequate representation against Rigsby

In his second claim for relief, Miranda asserts that Rigsby failed to provide effective assistance to him by failing to investigate, prepare and defend Miranda in his criminal case. This allegation is premised on § 1983. However, a § 1983 claim must allege that the conduct was done under color of state law.

Parratt v. Taylor, 451 U.S. 527, 535 (1981). Defendant Rigsby, however, acted as a public defender, and inasmuch as he performed the traditional role as Miranda's counsel, did not act under color of state law. Polk County v. Dodson, 454 U.S. 312, 325 (1981). Rigsby's alleged liability as set forth in the second claim for relief is premised on his performance as Miranda's counsel; accordingly, this allegation fails to state a claim upon which relief can be granted.

VI. Claims of conspiracy involving Clark County, Harris and Rigsby

Miranda alleges conspiracy, under § 1985(3), against defendants Clark County, Harris, and Rigsby. Miranda asserts that Clark County has a policy of assigning minimal resources to investigate and defend clients based on their race and religion. To state a claim under Section 1985(3), the plaintiff must show: (1) a conspiracy involving two or more persons; (2) for the purpose of depriving a person of equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) whereby a person is either injured in his person or property, or deprived of a right or privilege of a United States Citizen. United Brotherhood of Carpenters & Joiners of America v. Scott, 463 U.S. 825, 828-29 (1983); Mustafa v. Clark County School District, 157 F.3d 1169, 1181 (9th Cir. 1998). However, Miranda provides no facts to support the allegation of a conspiracy involving Clark County, Harris or Rigsby. The § 1985 allegations will therefore be dismissed. See Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 626 (9th Cir. 1988) (mere allegation of conspiracy without factual specificity is insufficient).

VII. Claims against Detectives Leonard and Maddock

Miranda's § 1983 against Detectives Leonard and Maddock allege that they were acting under the color of state law as homicide detectives investigating the crimes that implicated Miranda; and failed to preserve and disclose exculpatory and impeachment evidence to the defense in violation of Miranda's

constitutional rights. Leonard and Maddock argue that as police officers they are absolutely immune while functioning as prosecutors, and enjoy qualified immunity in their law enforcement capacities. Leonard and Maddock also argue that police officers have no duty to disclose exculpatory and impeachment evidence to the defense; but rather, owe such a duty only to the prosecution. Walker v. City of New York, 974 F.2d 293, 299 (2d Cir. 1992), cert. denied, 507 U.S. 961, 972 (1993). Miranda also requests leave to amend to specifically plead that Leonard and Maddock breached their duty to disclose exculpatory evidence to the prosecution.

The absolute immunity of prosecutors from liability in suits under § 1983 is well established. Imbler v. Pachtman, 424 U.S. 409, 429 (1976); Ashelman v. Pope, 793 F.2d 1072, 1076 (9th Cir. 1986) (en banc). Other government officials may enjoy absolute immunity if their special functions or constitutional status required complete protection. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). Officials asserting absolute immunity must (1) show that responsibilities of their office embraced function so sensitive as to require a total shield from liability; and (2) demonstrate that they were discharging a protected function when performing acts for which liability was asserted. Id. at 812-13.

Finally, the Court has not "created" any immunities applicable to Section 1983 rather than those "well grounded in history and reason." Buckley v. Fitzsimmons, 509 U.S. 259, 268, (1993) (quoting Tenney v. Brandhove, 341 U.S. 367, 376, (1951)); Kirnes v. Stone, 84 F.3d 1121. 1128 (9th Cir. 1996).[1] Here, the complaint alleges that Detectives Leonard and Maddock violated Miranda's rights while performing their

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[1] The case cited by Leonard and Maddock in support of their absolute immunity argument, Jean v. Collins, 155 F,3d 701 (4th Cir. 1998) was recently vacated and remanded by the Supreme Court to the Fourth Circuit for further consideration in light of Wilson v. Layne, 119 S.Ct. 1692 (1999).

traditional investigatory function. Thus, in a test of the sufficiency of the allegations, they are not entitled to the defense of absolute immunity.

Officials are entitled to qualified immunity where their discretionary function does not violate "clearly established" statutory or constitutional rights of which a reasonable official would have known. Harlow, 457 U.S. at 818; Trotter. Inc. v. Watkins, 869 F.2d 1312, 1314 (9th Cir. 1989). In Wilson, 119 S. Ct. 1692 (1999), the Court held that "a court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'" Id. at 1697 (citing Conn v. Gabben, 119 S. Ct. 1292, 1295 (1999)). To determine whether pre-existing law was "clearly established," the Ninth Circuit has held that absent binding precedent "the court should look to all available law including the law at other circuits and district courts." Lum v. Jensen, 876 F.2d 1385, 1387 (9th Cir. 1989), cert. denied, 493 U.S. 1057 (1990).

In Smiddy v. Varney, 665 F.2d 261 (9th Cir. 1981) (en banc), cert. denied, 459 U.S. 829 (1982), the Ninth Circuit held that qualified immunity would he removed if the investigating officers present false information to the prosecutor, or in other ways impede the prosecutor from exercising his or her independent judgment. Id. at 266. Thus, it is not inconceivable that Miranda could amend his complaint to state a cause of action against Leonard and Maddock for failure to disclose relevant information to the prosecutor. Miranda will therefore be granted leave to amend. Accordingly,

IT IS HEREBY ORDERED that the defendant Morgan Harris' motion to dismiss (#16) is GRANTED.

IT IS FURTHER ORDERED that defendant Clark County's motion to dismiss (#18) is GRANTED.

IT IS FURTHER ORDERED that defendant Thomas Rigsby's motion to dismiss (#19) is GRANTED.

IT IS FURTHER ORDERED that defendants Leonard's and Maddock's motion to dismiss (#17) is DENIED without prejudice to the extent that Miranda files within thirty (30) days from the date of entry of this order, an amended complaint alleging Leonard's and Maddock's failure to disclose exculpatory and impeachment evidence to the prosecution.

DATED this 6 day of October, 1999.

/s/
Lloyd D. George
United States District Judge

APPENDIX E

United States Court of Appeals,

Ninth Circuit.

Roberto Hernandez MIRANDA, Plaintiff-Appellant,

v.

CLARK COUNTY, NEVADA; Morgan Harris; Thomas Rigsby, Defendants-Appellees.

No. 00-15734.

July 24, 2002.

ORDER

SCHROEDER, Chief Judge.

Upon the vote of a majority of nonrecused regular active judges of this court,[1] it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

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[1] Judge Rawlinson was recused.

APPENDIX F

The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

The Nevada Revised Statutes and Supreme Court Rules provide in pertinent part:

Nev. Rev. Stat. 171.188:

Procedure for appointment of attorney for indigent defendant

1. Any defendant charged with a public offense who is an indigent may, by oral statement to the district judge, justice of the peace, municipal judge or master, request the appointment of an attorney to represent him.
2. The request must be accompanied by the defendant's affidavit, which must state:
   (a) That he is without means of employing an attorney; and
   (b) Facts with some particularity, definiteness and certainty concerning his financial disability.
3. The district judge, justice of the peace, municipal judge or master shall forthwith consider the application and

shall make such further inquiry as he considers necessary. If the district judge, justice of the peace, municipal judge or master:

(a) Finds that the defendant is without means of employing an attorney; and

(b) Otherwise determines that representation is required, the judge, justice or master shall designate the public defender of the county or the state public defender, as appropriate, to represent him. If the appropriate public defender is unable to represent him, or other good cause appears, another attorney must be appointed.

4. The county or state public defender must be reimbursed by the city for costs incurred in appearing in municipal court. The county shall reimburse the state public defender for costs incurred in appearing in justice's court. If a private attorney is appointed as provided in this section, he must be reimbursed by the county for appearance in justice's court or the city for appearance in municipal court in an amount not to exceed $75 per case.

Nev. Rev. Stat. 260.010:

Creation of office by ordinance; restrictions on creation; appointment; term of office

1. In counties whose population is 100,000 or more, the boards of county commissioners shall create by ordinance the office of public defender.

* * *

5. The office of public defender when created must be filled by appointment by the board of county commissioners.

6. The public defender serves at the pleasure of the board of county commissioners.

Nev. Rev. Stat. 260.030:

Qualifications; representation of indigent person charged with public offense

1. The public defender shall be a qualified attorney licensed to practice in this state.

2. The public defender shall, when designated pursuant to NRS 171.188, represent, without charge, each indigent person who is under arrest and held for a public offense.

Nev. Rev. Stat. 260.040:

Compensation; deputies and employees; private practice of law limited; expenses; deputies in certain counties governed by merit personnel system

1. The compensation of the public defender must be fixed by the board of county commissioners. The public defender of any two or more counties must be compensated and be permitted private civil practice of the law as determined by the boards of county commissioners of those counties, subject to the provisions of subsection 4 of this section and NRS 7.065.

2. The public defender may appoint as many deputies or assistant attorneys, clerks, investigators, stenographers and other employees as he considers necessary to enable him to carry out his responsibilities, with the approval of the board of county commissioners. An assistant attorney must be a qualified attorney licensed to practice in this state and may be placed on a part-time or full-time basis.

Nev. Rev. Stat. 260.050:

Interview with and representation of indigent person

1. The public defender may, before being designated as counsel for that person pursuant to NRS 171.188, interview an indigent person when he has been arrested

and confined for a public offense or for questioning on suspicion of having committed a public offense.

2. The public defender *shall,* when designated pursuant to NRS 62.085, 171.188 or 432B.420, and *within the limits of available money*, represent without charge each indigent person for whom he is appointed.

3. When representing an indigent person, the public defender shall:

   (a) Counsel and defend him at every stage of the proceedings, including revocation of probation or parole; and

   (b) Prosecute, subject to the provisions of subsection 4 of NRS 180.060, any appeals or other remedies before or after conviction that he considers to be in the interests of justice.

Nev. Supreme Ct. Rule 167:

Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Nev. Supreme Ct. Rule 188:

Professional independence of a lawyer

* * *

3. A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Supreme Court, U.S.
FILED
JUL 8 _ 2003
OFFICE OF THE CLERK

No. 02-1629

IN THE
Supreme Court of the United States

CLARK COUNTY, NEVADA AND MORGAN HARRIS,

Petitioners,

v.

ROBERTO MIRANDA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

J. DOUGLAS MCCALLA
Counsel of Record
ROY A. JACOBSON, JR.
LARISSA A. FERULLO
SPENCE, MORIARITY & SHOCKEY, LLC
P.O. Box 548
Jackson, WY 83001
(307) 733-7290

Attorneys for Respondent

July 8, 2003

QUESTION PRESENTED

Whether the Ninth Circuit's decision that respondent's complaint states a claim against the petitioners under 42 U.S.C. § 1983 for depriving him of his Sixth Amendment rights under color of law presents any issues that merit review by this Court.

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INTRODUCTION

This is an unusual case. Respondent Roberto Miranda spent fourteen years on death row for a crime he did not commit. In 1996, a Nevada state court granted his petition for post-conviction relief and vacated both his conviction and sentence. App., *infra*, 1a. The court found that he had received ineffective assistance of counsel because the inexperienced assistant public defender who handled his case had conducted virtually no investigation and had therefore failed to uncover strong evidence indicating that Mr. Miranda was innocent and implicating the principal prosecution witness, Fernando Cabrera, as the real killer.

Mr. Miranda later filed this lawsuit under 42 U.S.C. § 1983 against (among others) Clark County, Nevada, and its head Public Defender, Morgan Harris, claiming that they were liable for the violation of his Sixth Amendment rights because the violation was the result of administrative policies promulgated by the Public Defender as the final policymaker for the County on the matters at issue. In the interlocutory ruling that gives rise to this petition, the *en banc* Ninth Circuit held that Mr. Miranda's complaint was sufficient to state a claim under Rule 12(b)(6). *Miranda v. Clark County*, 319 F.3d 465 (9th Cir. 2003) (*en banc*). In particular, the court held that the complaint adequately alleged state action by the Public Defender under *Polk County v. Dodson*, 454 U.S. 312 (1981); that it stated a claim that the violation of Miranda's Sixth Amendment rights was attributable to the Public Defender's policies; and that it sufficiently alleged that the Public Defender was a policymaker for the County whose actions could subject it to liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The court therefore remanded for further proceedings, including discovery on Mr. Miranda's claims.

The petitioners' request that this Court step in at this early stage in the proceedings is fundamentally misguided. Petitioners' assertion that there is a conflict among the

circuits over the state action issue is incorrect, and in the absence of a conflict the issue is merely one of application of *Polk County* to an unusual set of as-yet undeveloped facts. Petitioners' assertion that the case presents an important Sixth Amendment issue rests on a mischaracterization of the Ninth Circuit's ruling on this point. Far from dispensing with basic elements of a Sixth Amendment claim under *Strickland v. Washington*, 466 U.S. 668 (1984), the Ninth Circuit considered only whether Mr. Miranda had adequately alleged a basis for holding these particular defendants liable for a Sixth Amendment violation that had already been established under the *Strickland* standard in Mr. Miranda's post-conviction proceedings. App., *infra*, 1a. Review of that fact-bound determination is unwarranted, especially since the factual record has yet to be developed. Finally, petitioners' assertion that the Public Defender is not a policymaker for Clark County within the meaning of *Monell* is, by petitioners' own admission, a fact-specific issue of *state* law, and, in any event, petitioners' position on that issue rests on a complete misunderstanding of what it means for an official to be a policymaker within the meaning of *Monell* and its progeny. For all these reasons, the petition for certiorari should be denied.

STATEMENT OF THE CASE

In August 1981, Manuel Torres was murdered in Las Vegas, Nevada. Police suspicion at first focused on Fernando Cabrera, whose fingerprints were found in Torres' pickup truck, who had been seen selling Torres' possessions on the street, and who had in his pocket a ring belonging to Torres. Cabrera's brother and sister-in-law also informed the police that Cabrera's lover had told them Cabrera had come home "all bloody" the night of the murder and said he had "killed a Mexican man who worked at the Stardust Hotel" (a description that fit Torres).

Cabrera repeatedly denied that he knew anything about the murder, and even denied knowing Torres, but eventually

told the police that Roberto Miranda had killed Torres. Cabrera singled out Mr. Miranda because he resented Mr. Miranda's relationship with a woman with whom Cabrera had once been intimately involved. Despite Cabrera's motives for implicating someone else and the substantial evidence pointing to him as the killer, Mr. Miranda was arrested and charged with capital murder.

The Clark County Public Defender's Office assigned Thomas Rigsby, an assistant public defender with little more than a year's experience who had never tried a capital case, to defend Mr. Miranda. At Mr. Miranda's first meeting with Rigsby, Rigsby asked him to take a polygraph test, to which he agreed. The test was administered to Mr. Miranda, a Spanish speaker, by an English-speaking examiner, whose interpretation of the results was adverse to Mr. Miranda.

Thereafter, Rigsby did virtually nothing to prepare for Mr. Miranda's trial. Mr. Miranda supplied him with the names of witnesses who would contradict the testimony against Mr. Miranda, would implicate Cabrera in the crime, and would explain Cabrera's motives for trying to pin the crime on Mr. Miranda. Rigsby, however, failed to interview the witnesses and obtain their attendance at Mr. Miranda's trial. The trial court refused Mr. Miranda's requests to replace Rigsby with another lawyer who would represent him more diligently.

Mr. Miranda was tried in August 1982. Cabrera was the principal prosecution witness against him. Because of Rigsby's lack of effort, the many witnesses who would have contradicted and impeached Cabrera's testimony did not testify, and Mr. Miranda was convicted and, after a one-day sentencing hearing, sentenced to death. Over Mr. Miranda's objection, Rigsby continued to represent him on direct appeal, and his conviction and sentence were affirmed.

So began Mr. Miranda's fourteen-year odyssey through the arcane world of capital post-conviction proceedings. Mr. Miranda's initial efforts to obtain state post-conviction relief

proved unsuccessful after bouncing up and down through the Nevada courts for six years. His first (and only) federal habeas petition was then dismissed without prejudice to allow exhaustion of certain claims. In May 1994, Mr. Miranda filed a petition for habeas corpus in the state trial court raising, among other things, the claim that Rigsby's failure to investigate the case and to discover and procure the attendance of defense witnesses constituted ineffective assistance of counsel in violation of the Sixth Amendment.

The court held an evidentiary hearing on July 13, 1995. Based on testimony presented at that hearing as well as on uncontradicted declarations submitted on behalf of Mr. Miranda, the court concluded that Rigsby had failed to investigate the case adequately, had not located reasonably available defense witnesses, and as a result had not presented at trial testimony and other evidence that would, "in reasonable probability, have effected [*sic*] the outcome of the trial." App., *infra*, 4a. The court found that "[t]he lack of pre-trial investigation and preparation by trial counsel, as is set forth in the petition for writ of habeas corpus and unchallenged by the state, cannot be justified." *Id.* at 5a. The court observed as well that it appeared "that there are many additional grounds upon which relief would be warranted," but that "[t]he failure of trial counsel to effectively investigate and prepare this case for trial is so glaring and clear that this Court finds there is no need to proceed beyond the issue of the violation of the Sixth Amendment guarantee of effective assistance of counsel in order to decide the merits of the petition and grant relief." *Id.*

The State of Nevada declined to retry Mr. Miranda.

In August 1998, Mr. Miranda filed this lawsuit under 42 U.S.C. § 1983 in the United States District Court for the District of Nevada against petitioners Clark County and its Public Defender, Morgan Harris, as well as against Rigsby and certain others. The complaint alleges, among other things, that Rigsby performed an inadequate investigation

and provided a substandard defense, and that Mr. Miranda suffered prejudice as a result, in violation of the Sixth Amendment. In addition to seeking recovery from Rigsby for his direct role in this violation, the complaint alleges that the Public Defender is liable for the violation because it resulted from his policies of allocating resources to cases based on polygraph results and assigning inexperienced attorneys to capital cases. The complaint further alleges that the County is liable because the Public Defender was acting as the policymaker for Clark County.

The District Court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) as to Rigsby, the Public Defender, and the County under a heightened pleading standard (which this Court has repeatedly held inapplicable to civil rights complaints, *see Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993); *see also Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002)). As to Rigsby, the court held that the complaint failed to allege that he acted under color of state law within the meaning of *Polk County*. As to the Public Defender and the County, the court held that the complaint did not allege a sufficient basis for attributing the Sixth Amendment violation to them.

Because the dismissal did not dispose of claims against certain other defendants, Mr. Miranda obtained a Rule 54(b) order and appealed. A panel of the Ninth Circuit affirmed, but the court granted Mr. Miranda's petition for rehearing *en banc* and vacated the panel opinion. The *en banc* court then affirmed the dismissal as to Rigsby under *Polk County*, but found that the complaint stated a cause of action against both the Public Defender and the County under the liberal pleading standard applicable to civil rights complaints.

The court observed that while *Polk County* precludes a finding that a public defender is a state actor when acting as counsel on behalf of a defendant, the decision permits a finding of state action when a public defender is engaged in

"administrative and possibly investigative functions." 319 F.3d at 469 (quoting *Polk County*, 454 U.S. at 325). Emphasizing that "[k]ey to our review is the stricture that when reviewing a dismissal of a complaint under Rule 12(b)(6), all allegations are to be considered in a light most favorable to the plaintiff," *id.*, the court held that Mr. Miranda had alleged that the Public Defender was engaged in an administrative function when he promulgated the polygraph and attorney assignment policies on which the complaint premised its claims of liability.

The court also held that the complaint sufficiently alleged that those policies resulted in the Sixth Amendment violation Mr. Miranda had suffered and constituted deliberate indifference to his constitutional rights within the meaning of *Canton v. Harris*, 489 U.S. 378 (1989). *See* 319 F.3d at 470-71. Moreover, as to the County, the Ninth Circuit held that the complaint adequately stated a claim for municipal liability under *Monell*, 436 U.S. at 690-91, by alleging that in promulgating the challenged policies, the Public Defender was acting "as a policymaker on behalf of Clark County." 319 F.3d at 470.

Accordingly, the court reversed the judgment in favor of the Public Defender and the County and remanded to the district court for further proceedings.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S APPLICATION OF *POLK COUNTY V. DODSON* DOES NOT WARRANT REVIEW.

The Ninth Circuit's holding in this case represents a straightforward application of the holding in *Polk County* — that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding" but may be a state actor "while performing certain administrative ... functions" — to the particular allegations of the complaint in this case.

Polk County, 454 U.S. at 325. The Ninth Circuit faithfully cited the principles of *Polk County*. *See* 319 F.3d at 466-67. Consistent with this Court's emphasis in *Polk County* that "we do not suggest that a public defender never acts" under color of law, 454 U.S. at 324-25, the Ninth Circuit carefully considered the allegations of Mr. Miranda's complaint and concluded that it stated a claim that the Clark County Public Defender's performance of the administrative function of formulating policies governing the allocation of his office's resources gave rise to the violation of Mr. Miranda's Sixth Amendment rights. Whether those policies in fact existed, and whether they in fact caused the deprivation of Mr. Miranda's rights, are matters yet to be determined.

Under this Court's Rule 10, the Ninth Circuit's application of the "properly stated rule of law" of *Polk County* to the particular allegations of Mr. Miranda's complaint is not a question worthy of a grant of certiorari. Petitioners' contrary claim that this fact-bound and interlocutory ruling merits review by this Court rests principally on the contention that it conflicts with holdings of the Eighth and Tenth Circuits. Review of the decisions petitioners cite, however, reveals that the "conflict" is illusory.

Petitioners rely primarily on the Eighth Circuit's decision in *Eling v. Jones*, 797 F.2d 697 (8th Cir. 1986). There, the court held, on appeal from a district court's summary judgment ruling, that public defenders had not acted under color of state law when they refused to provide copies of transcripts to their indigent clients in particular cases. In that case, however, the court explicitly found, on the factual record developed in the case, that in denying the transcripts in particular cases, the public defender "was dealing with appellants as clients," and that "[t]he uncontroverted evidence clearly shows that the Public Defender exercised a certain amount of discretion and used professional judgment in deciding not to order copies of the transcripts" in the cases

at issue. 797 F.2d at 699. Although the court did offhandedly use the word "policy" once in its opinion when discussing another issue (*see id.*), it did not, as the petitioners misleadingly imply (Pet. at 10), frame the issue as a challenge to a policy of the public defender's office. Indeed, the court's discussion of *Polk County* included no consideration of whether there was an administrative "policy" that supplied the element of state action.[1]

Petitioners' reliance on the Tenth Circuit's unpublished disposition in *Brown v. Langdon*, 5 F.3d 545 (Table), 1993 WL 372685 (10th Cir. Sept. 24, 1993), is an even weaker reed on which to rest their claim that this case merits review. Under Tenth Circuit Rule 36.3, "[u]npublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel." Because the court's disposition in *Brown* does not necessarily indicate how the Tenth Circuit would decide even an identical case in the future, let alone provide principles that would determine its rulings in cases presenting factual differences, it cannot establish a conflict among the circuits on the question in this case.

Moreover, the unpublished order and judgment in *Brown*, even if it were regarded as a precedent in some sense, hardly could be said to conflict with the Ninth Circuit's decision in this case. *Brown* involved the alleged denial of a transcript to a single prisoner, and the only "holding" in the court's memorandum was that "the refusal of a state public defender to furnish a copy of a trial transcript to an indigent prisoner represented by a public defender does not state a claim under 1983." 1993 WL 372685, at *2. The court's memorandum did not address whether state action could be found on the basis of a public defender's administrative policies, nor does

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[1] The court's only reference to a "policy" came in dicta in which the court suggested that the office "revie[w] and reconside[r]" its policy. 797 F.2d at 699.

it even appear that the complaint filed by the inmate in that case had properly alleged the existence of such a policy.[2]

In sum, neither of the two cases on which petitioners rely for their assertion of a conflict addresses whether a public defender may be found to have acted under color of state law in promulgating an administrative policy governing the operation of his office — let alone an administrative policy concerning the allocation of office resources to the defense of cases, which is the specific issue here. And beyond *Eling* and *Brown*, petitioners identify no other lower court cases that even come close to addressing the *Polk County* "under color of law" issue presented by this case.

The paucity of relevant cases cited by petitioners is ironic given their assertion that the issue presented is "important and recurring" (Pet. at 11). In the more than twenty years since *Polk County* was decided, petitioners can point to only three federal appellate decisions (including this case) that present even vaguely similar issues. The most recent case they cite (other than the opinion below) is the decade-old unpublished disposition in *Brown*. And the Ninth Circuit's opinion in this case appears to be the *only* federal appellate opinion since *Polk County* that considers whether a public defender acted under color of state law in promulgating administrative policies that govern the allocation of his office's resources and that have allegedly resulted in the deprivation of a defendant's Sixth Amendment right to

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[2] The only mention of the word "policy" in the court's memorandum comes in its description of the points raised by the inmate on appeal, which included that "the policy of the Wyoming Public Defenders in the handling of indigent criminal defendant's documents is violative of the Fourteenth Amendment." 1993 WL 372685, at *1. The court's memorandum, however, does not go on to address any alleged "policy," apparently because the inmate's allegations "show[ed] the estranged correspondence between the public defenders office and its former client, and no more." *Id.* at *2 n.3.

effective assistance of counsel. That is hardly the hallmark of a recurring issue.

Finally, even if the Court were interested in addressing whether and under what circumstances the issuance of administrative policies by a head public defender constitutes state action for purposes of § 1983, the interlocutory posture of this case would make it a poor choice as a vehicle for deciding such issues. Because the case was appealed from a Rule 12(b)(6) dismissal, there is as yet no factual record — let alone any factual determination — about the existence or nature of the Public Defender's policies or their relationship to the violation of Mr. Miranda's Sixth Amendment rights. Proceedings on remand could yet obviate the need to address the *Polk County* issue altogether if Mr. Miranda does not succeed in proving his case. More importantly, even positing (as we do) that Mr. Miranda will be able to prove the allegations of his complaint, a factual record disclosing exactly what the policies were, and how they were promulgated and applied in the circumstances of this case, would contribute to a more informed decision on the application of the principles of *Polk County* in a concrete factual setting. This case is, therefore, an obvious candidate for application of this Court's normal practice of not granting certiorari to review an interlocutory ruling of a federal court of appeals. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002). Without more development in the court below, the Ninth Circuit's ruling in this case is still too preliminary for review "given the interlocutory posture of the case." *Nike, Inc. v. Kasky*, 539 U.S. ___, ___ (2003).

II. PETITIONERS' SIXTH AMENDMENT ARGUMENT IS MERITLESS.

Petitioners argue at length that the Ninth Circuit erred in failing to evaluate Mr. Miranda's ineffective assistance of counsel claims under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Indeed, petitioners go so

far as to claim that the Ninth Circuit dispensed completely with *Strickland*'s holding that proof of a Sixth Amendment violation requires a showing that counsel's performance fell "outside the wide range of professionally competent assistance," *id.* at 688, and that "counsel's deficient performance actually prejudiced the defense." Pet. at 17 (citing *Strickland*, 466 U.S. at 687). According to petitioners, the Ninth Circuit cast these requirements to the winds and instead held that the polygraph and case assignment policies of the Clark County Public Defender were "*per se* violations of the Sixth Amendment." Pet. at 19.

Petitioners' assertion that the Ninth Circuit held that these policies "automatically violate the Sixth Amendment" (Pet. at 19) without regard to *Strickland*'s requirements of deficient performance and prejudice is obviously incorrect. Of course, *Strickland* requires a showing of both deficient performance and resulting prejudice. *See, e.g., Wiggins v. Smith*, 539 U.S. __, __ (2003). The reason the Ninth Circuit did not discuss the *Strickland* standard was not that it was unaware of *Strickland*,[3] but that the existence of a Sixth Amendment violation under *Strickland* was not the issue before it. Indeed, it had already been established that Mr. Miranda's Sixth Amendment rights were violated under the *Strickland* standard. A Nevada court so held when it granted him post-conviction relief in an order that made crystal clear that both parts of the *Strickland* standard were satisfied:

> The failure of trial counsel to investigate and present available witness testimony, much of which had been identified to trial counsel by petitioner prior to trial, violated petitioner's rights to due process and effective

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[3] The Ninth Circuit regularly follows *Strickland*, and its precedents show that it knows that a Sixth Amendment ineffectiveness claim requires satisfaction of *Strickland*'s two-part test. *See, e.g., United States v. Tekle*, 329 F.3d 1108, 1113 (9th Cir. 2003); *United States v. Leonti*, 326 F.3d 1111, 1120-21 (9th Cir. 2003); *McClure v. Thompson*, 323 F.3d 1233, 1241 (9th Cir. 2003).

> assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. Petitioner has demonstrated in these proceedings that his trial counsel's performance fell below any reasonable objective standard of constitutionally adequate representation. Based upon this Court's consideration of the evidence that has been adduced by petitioner in these proceedings, the Court concludes that the verdict returned by the jury is unreliable. *Strickland v. Washington*, 466 U.S. 668 (1984); *Sanborn v. State*, 107 Nev. 388, 812 P.2d 1279 (1991).

App., *infra*, 6a.

Thus, the issue before the Ninth Circuit was not whether Mr. Miranda had alleged a Sixth Amendment violation under *Strickland* — no one could possibly doubt that he had — but rather whether he had alleged a basis for holding petitioners liable for that violation. As the Ninth Circuit correctly understood (but petitioners apparently do not) that question turned not on whether the challenged policies were "*per se* violations" of the Sixth Amendment, but on "whether the alleged polic[ies] *resulted in* deprivation of the plaintiff's constitutional rights to effective representation of counsel." 319 F.3d at 470 (emphasis added). In short, the Ninth Circuit did not hold that the policies themselves constituted ineffective assistance of counsel, but only that Mr. Miranda had adequately alleged that the policies reflected deliberate indifference to the right of defendants to effective assistance of counsel and that they had resulted, in his case, in a deprivation of that constitutional right (a deprivation whose existence had already been confirmed by his successful post-conviction review efforts). *Id.* at 470-71.

The Ninth Circuit's analysis applied settled principles to the particular allegations of this complaint. *Canton v. Harris*, 489 U.S. 378 (1989), is instructive on this issue. In *Canton*, this Court held that cities can be held liable under § 1983 for a policy of inadequately training their employees "where the

failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact" and a constitutional violation results. *Id.* at 388. The Court expressly "reject[ed] [the] contention that only unconstitutional policies are actionable under the statute." *Id.* at 387. Rather, the issue is whether the policy "*itself* causes the constitutional violation at issue." *Id.* at 385 (emphasis in original). Consistent with this principle, the Ninth Circuit held in this case only that Mr. Miranda had adequately alleged a policy that amounted to deliberate indifference and that caused the Sixth Amendment violation he unquestionably suffered.

Beyond their mischaracterization of the Ninth Circuit's decision as an assault on *Strickland*, petitioners offer no other good reasons for review of the Sixth Amendment issue by this Court. They allege no conflict among the lower federal courts over whether similar policies reflect deliberate indifference to Sixth Amendment rights sufficient to satisfy the *Canton* standard, for the simple reason that there are no other cases addressing this fact-specific issue. Instead, they argue only that the Ninth Circuit's ruling is "mistaken" (Pet. at 20) and is "predicated on an implausible reading of the complaint." (Pet. at 19.) Neither assertion is correct, but more importantly, this Court does not ordinarily sit to rectify "mistakes," far less to correct courts of appeals on their "reading" of complaints.

Moreover, petitioners' grave warning that "the *en banc* opinion will provide the basis for a flood of ineffective-assistance claims arising from policies of public defender services" is implausible at best. Pet. at 20. As even the Ninth Circuit is aware (though petitioners apparently are not), to file a § 1983 claim premised on ineffective assistance of counsel, a prisoner would first have to obtain appellate or post-conviction relief on that basis, because "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or

sentence has been invalidated." *Heck v. Humphrey*, 512 U.S. 477, 489-90 (1994); *see also Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995) (applying *Heck* to lawsuit claiming ineffective assistance of counsel); *Boyd v. Biggers*, 31 F.3d 279, 283 (5th Cir. 1994) (same). Thus, the pool of possible plaintiffs would be limited to the very small number of prisoners who receive habeas relief based on ineffective assistance of counsel by a public defender. Given that only 351 capital defendants were granted state post-conviction relief between 1973 and 2000, it is hardly likely that "countless" cases will result. *See* James S. Liebman *et al.*, *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, Appendix C (2002) (available at www2.law.columbia.edu/brokensystem2/appendix.html).

In any event, the interlocutory posture of the case cuts against review of the Sixth Amendment issue as well. Whether petitioners' policies rendered them responsible under the *Canton* standard for the violation of Mr. Miranda's constitutional rights is an issue that would be best answered on a factual record that made clear exactly what those policies were and what causal relationship they had to the ineffective assistance of counsel that Mr. Miranda received.

III. PETITIONERS' MUNICIPAL LIABILITY ARGUMENTS REFLECT A BASIC MISUNDERSTANDING OF *MONELL* AND PRESENT NO ISSUE MERITING THIS COURT'S REVIEW.

As this Court held in *Pembaur v. Cincinnati*, "where action is directed by those who establish governmental policy, the municipality is equally responsible." 475 U.S. 469, 481 (1986). The Ninth Circuit's holding that Mr. Miranda stated a claim against Clark County reflected only the court's determination that he properly alleged that the Public Defender had decisionmaking authority for the County with respect to the policies that allegedly caused the

violation of Mr. Miranda's constitutional rights. Whether the Public Defender's acts "may fairly be said to represent official policy" of the County, *Monell*, 436 U.S. at 694, is nothing more than a fact-bound question involving application of principles settled by a long string of this Court's decisions, including *Monell*, *Pembaur*, *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), *Canton*, *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997), and *McMillian v. Monroe County*, 520 U.S. 781 (1997). Again, this Court's Rule 10 provides that such a decision is not ordinarily a candidate for review on certiorari.

The accuracy of the Ninth Circuit's fact-specific ruling as to Clark County in particular is validated by a recent study of the Clark County Public Defender's Office. "In March, 2002, Clark County issued a Request for Proposal (RFP) to evaluate current practices and recommend alternatives for improving the efficient use of attorney and staff in the Clark County Public Defender Office (CCPDO)." The National Legal Aid & Defender Association, *Evaluation of the Public Defender Office: Clark County, Nevada, March 2003*, www.nlada.org/Defender/Defender_Evaluation, Executive Summary at i. In this recently released, comprehensive evaluation, the authors noted "the community's number one charge against the office: namely that the CCPDO's obligation to the courts *and the County* historically has superceded the organization's commitment to its clients." *Id.* at 20 (emphasis added). The evaluation also found that "the history of the CCPDO includes significant community dissatisfaction with the manner in which the office has been providing constitutionally mandated services." *Id.* at 67. The evaluation repeatedly referenced the complete lack of training given to public defenders and the strong need for initial and ongoing training. *Id.* at 12, 14-19, 57-59, 100. Petitioners understandably avoid any mention of the existence of this evaluation, which confirms that the Public

Defender's acts "may fairly be said to represent official policy" of the County. *Monell*, 436 U.S. at 694.

In any event, petitioners do not allege that there is a conflict among the circuits over whether the head of a public defender's office is a policymaker for the municipality he serves, nor, indeed, do they identify any other lower court decision that even addresses that issue.[4] Instead, petitioners argue at great length that the Ninth Circuit's decision conflicts with *Monell* and its progeny because the Public Defender acts independently, and not under the control of the Board of Commissioners of Clark County, in developing and implementing the policies of his office.

Petitioners' argument, however, rests on a fundamental misunderstanding of *Monell*. Indeed, it turns the entire *Monell* line of cases on its head. Under this Court's decisions, an official's actions may subject the municipality he serves to liability under § 1983 *only* if he has "*final* policymaking authority" for the "particular area" or

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[4] In a footnote, petitioners halfheartedly claim that the Ninth Circuit's decision conflicts in principle with decisions of the Fourth Circuit, namely *Grayson v. Peed*, 195 F.3d 692, 697-98 (4th Cir. 1999), and *Knight v. Vernon*, 214 F.3d 544, 552 (4th Cir. 2000). In *Grayson*, however, the Fourth Circuit held that the county being sued was not liable principally because "there are no underlying constitutional violations by any individual." 195 F.3d at 697. In addition, the court held that under Virginia state law, the sheriff acted exclusively for the state in operating the jail where the alleged violation took place. *Id.* Here, there is no doubt that Miranda's constitutional rights were violated or that the County Public Defender acts on behalf of the county. As for *Knight*, in that case a former jailer sued the sheriff and county for improper termination. The Fourth Circuit held that the county was not liable for her termination, but did so based on a specific provision of North Carolina law vesting the sheriff with "the exclusive right" to make personnel decisions. 214 F.3d 544, 552 (quoting N.C. Gen. Stat. 153A-103). The Fourth Circuit's analysis in *Knight* is highly questionable under *Pembaur*, *Praprotnik*, and *McMillian*, but its application of *Monell* principles to the particular statutory scheme applicable to North Carolina sheriffs hardly conflicts with the Ninth Circuit's ruling in this case.

"particular issue" involved in the case. *E.g.*, *McMillian*, 520 U.S. at 785 (emphasis added). Thus, the fact that the Public Defender acts independently of the Board of Commissioners and has the final say in developing the policies of his office does not *immunize* the county from liability for his actions. Rather, it is what *makes* the county liable for his actions. Petitioners admit that "there is no dispute that petitioner Harris, the Chief Public Defender, has made final decisions for the Public Defender's Office." Pet. at 24 n.11. Indeed, as the Court explained in *Praprotnik*, if the Commissioners controlled the Public Defender's creation of policies for his office, they and not the Public Defender would be the final policymakers:

> [A]s the *Pembaur* plurality recognized, the authority to make municipal policy is necessarily the authority to make *final* policy. 475 U.S., at 481-484. When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies.

Praprotnik, 485 U.S. at 127 (emphasis added). Thus, far from being inconsistent with the independent decisionmaking authority of the Public Defender (Pet. at 28-30), the Ninth Circuit's recognition that he is the policymaker for the county on the matters at issue is, under this Court's decisions, quite correctly *premised* on that authority.

To be sure, municipal liability requires not only that the policymaker have final authority, but that he have final authority *for the municipality* — as opposed to, for example, the state. *McMillian*, 520 U.S. at 785-86. As petitioners observe, what entity a particular decisionmaker serves is a matter of state law. *See id.* at 786. Petitioners' suggestion that

this Court should review the correctness of the Ninth Circuit's determination that the Public Defender is a policymaker for the County under Nevada law, however, is wholly unwarranted.

To begin with, petitioners' argument runs head-on into the established rule that an asserted error in the application of state law by a federal court of appeals is not a matter that warrants this Court's review. *See Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); Sup. Ct. R. 10. In any event, contrary to petitioners' assertion that the Ninth Circuit "ignored" state law (Pet. at 25), the Ninth Circuit expressly acknowledged the role of state law, citing the very statutes regarding the establishment of public defenders' offices that petitioners claim it ignored. *See* 319 F.3d at 469 (citing Nev. Rev. Stat. chs. 180.090, 260.010, -.040, -.070, -.075).

Indeed, if anyone has ignored the relevant provisions of state law, it is the petitioners, who overlook that Nevada state law provides that the office of public defender is created by ordinance of the boards of county commissioners, Nev. Rev. Stat. § 260.010(1), that the position "must be filled by appointment by the board of county commissioners," *id.* § 260.010(5), and, critically, that "[t]he public defender serves at the pleasure of the board of county commissioners," *id.* § 260.010(6). Moreover, a public defender's compensation is determined by the board of county commissioners, *id.* § 260.040(1), his office is funded by the board of county commissioners, *id.* § 260.040(5), his deputies (at least in a county as large as Clark County) are "governed by the merit personnel system of the county," *id.* § 260.040(6), and he reports to the board of county commissioners, *id.* § 260.070.

In sum, state law makes clear that the public defender is an officer of the county, and although state law also guarantees that he has independent decisionmaking authority for the county in matters affecting his office, that authority is precisely what makes him a policymaker whose actions may impose liability on the county under this Court's decisions.

This case is thus wholly unlike *McMillian v. Monroe County* and *Turquitt v. Jefferson County*, 137 F.3d 1285 (11th Cir. 1998), which petitioners discuss at length. In those cases, this Court and the Eleventh Circuit held that Alabama sheriffs, though policymakers, are not *county* policymakers but state officers. The decisions in both cases turned on specific and unique provisions of the Alabama Constitution that not only provide for the establishment of sheriff's offices, but also "clearly denominat[e] the sheriff as a member of the state's executive department." *Turquitt*, 137 F.3d at 1288 (citing Ala. Const. of 1901, Art. V, § 112). The legislative history of the Alabama Constitution and the Alabama Supreme Court's rulings also "reflect[] an intent to bring sheriffs under the control of superior state officials." *Id.*, 137 F.3d at 1288; *see also McMillian*, 520 U.S. at 789. Absent the exceptional state laws that were decisive in *McMillian* and *Turquitt*, this Court has recognized that county sheriffs are policymakers for their counties when they exercise final decisionmaking authority for a particular area within their control. *E.g., Pembaur*, 475 U.S. at 483 n.12.

Petitioners point to no comparable provisions of Nevada law reflecting a similar intent to make county public defenders officers of the state rather than the county. Indeed, the statutory provisions cited above demonstrate that Nevada public defenders are wholly unlike Alabama sheriffs in this respect. At most, petitioners demonstrate only that Nevada public defenders have a large degree of decisionmaking autonomy in operating their offices. That may be so, but, once again, that only demonstrates that the public defenders are final decisionmakers for their counties with respect to those matters, not that they are somehow separate from the counties whom they serve.

In the end, the only support petitioners offer for their argument that the public defender is "functionally independent" from the county is language describing the functions and loyalties of individual public defenders. *See*

Sanchez v. Murphy, 385 F. Supp. 1362, 1365 (D. Nev. 1974). Petitioners also cite language from other courts to show that "Nevada is not unusual in insulating public defenders from county control." Pet. at 27 n.14.[5] The language offered by petitioners, however, refers to the individual loyalties of individual public defenders, not to the chief public defenders who have "final authority to establish municipal policy with respect to the action ordered." *Pembaur*, 475 U.S. at 481.

CONCLUSION

Despite petitioners' best efforts, no issue worthy of this Court's review can be teased out of this unusual case. The Ninth Circuit's holding that Mr. Miranda's complaint adequately alleges state action follows this Court's analysis in *Polk County*, does not conflict with the decision of any other court of appeals, and is in any event interlocutory in nature. Petitioners' Sixth Amendment argument reflects a basic misunderstanding of the Ninth Circuit's holding, which in no way departed from *Strickland*, and their municipal liability arguments show an equally fundamental misunderstanding of *Monell* and its progeny.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[5] Even the cases offered by petitioners recognize that different levels of accountability apply to public defenders who serve as the heads of offices and deputy public defenders who represent individual clients. In *Sanchez*, the district court emphasized that, although courts appoint "the public defender" to represent defendants, "[t]he public defender appoints deputies and assigns a case to a deputy." 385 F. Supp. at 1365. When the district court discusses the "personal attorney-client relationship" it refers to the relationship "between a *deputy* and a defendant" — not between the defendant and the head of the office. *See also, e.g.*, *Reese v. Danforth*, 406 A.2d 735, 738 (Pa. 1979) (emphasizing that, for deputy public defenders, the "public or state function ceases" after appointment, thus highlighting the difference between county public defenders and their deputies).

Respectfully submitted,

J. DOUGLAS MCCALLA
Counsel of Record
ROY A. JACOBSON, JR.
LARISSA A. FERULLO
SPENCE, MORIARITY &
SHOCKEY, LLC
P.O. Box 548
Jackson, WY 83001
(307) 733-7290

Attorneys for Respondent

Date: July 8, 2003

APPENDIX

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA	)	
	)	
Plaintiff,	)	
	)	**Case No. C057788**
vs.	)	**Dept. No. XI**
	)	**Docket No. "S"**
ROBERTO HERNANDEZ, MIRANDA,	)	
	)	
	)	
Defendant.	)	
	)	

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding stems from a judgment of conviction and sentence of death for the crime of first degree murder which was imposed upon the petitioner on August 28, 1992. Petitioner has filed a petition for writ of habeas corpus in this court, challenging the constitutionality of his conviction and sentence on several grounds.

The trial judge, the Honorable Addeliar D. Guy, conducted evidentiary hearings in this matter. However, due to ill health and retirement, Judge Guy was unable to finalize any decision in this case. The undersigned was assigned by the Nevada Supreme Court to hear and determine all matters in this department which Judge Guy was unable to hear and decide. The undersigned has reviewed the documents filed by the parties in this action, as well as the file in this case, prior decisions of the Nevada Supreme Court, transcripts of the evidentiary hearing and arguments of counsel.

This Court notes that this case began in 1981, and the petition for writ of habeas corpus was filed in May of 1994. This matter has been pending since that time. NRS 34.820(7)

requires a court that considers a petition filed by a petitioner who has been sentenced to death to "make all reasonable efforts to expedite the matter and shall render a decision within 60 days after submission of the matter for decision".

Based upon the entire record in this case, this Court finds that the conviction and sentence of petitioner is unconstitutional. Accordingly, this court grants the relief requested by petitioner, and orders that a new trial be held.

FINDINGS OF FACT

1. On April 27, 1982 Roberto Miranda was arraigned in this Court. He was represented by Thomas Rigsby, of the Clark County Public Defender's office. Prior to trial, Mr. Miranda requested the appointment of another lawyer, and complained to the Court that Mr. Rigsby had not attempted to locate witnesses whom he had identified as being valuable to his defense. Mr. Miranda's motion to discharge counsel was denied, and the case proceeded to trial.

2. At the conclusion of trial, Mr. Miranda was convicted of first degree murder, robbery with he use of a deadly weapon and grand larceny. He was sentenced to death by the jury. Sentence was imposed by the trial judge on September 9, 1982.

3. An appeal was taken from the judgment of conviction and sentence. Mr. Rigsby represented petitioner on direct appeal, in spite of Mr. Miranda's continuing objection to Mr. Rigsby's representation.

4. The Nevada Supreme Court affirmed the conviction and sentence. *Miranda v. State*, 101 Nev. 562, 707 P.2d 1121 (1985).

5. On November 25, 1985, petitioner appeared in court for reimposition of the death penalty. Mr. Miranda was advised by both Mr. Rigsby and the deputy district attorney that he had four petitions for post-conviction relief available to him in state court in addition to procedures available in the federal system. The court appointed Mark Bailus, Esq. to

represent petitioner in post-conviction proceedings on December 10, 1985. Evidentiary hearings were conducted on before the trial court. Determinations by the trial judge denying post-conviction relief were twice appealed to the Nevada Supreme Court. Ultimately, the Supreme Court dismissed petitioner's appeal on February 1, 1991.

6. Thereafter, petitioner filed a petition for writ of habeas corpus in the United States District Court for the District of Nevada. Laura FitzSimmons was appointed to represent petitioner in those proceedings. The United States District Judge ultimately dismissed the federal petition to afford petitioner an opportunity to present issues to the state court which had not been adjudicated in the previous state proceedings.

7. In May of 1994, this petition for writ of habeas corpus was filed. Also filed with the petition was an appendix which contained several declarations and other documents. In early September, 1994, the state filed a motion to dismiss the petition alleging that petitioner had waived his right to challenge his conviction and sentence. On November 15, 1994 counsel for petitioner filed an opposition to the state's motion to dismiss, and requested the court defer ruling on the motion to dismiss until the evidentiary hearing was held on the petition. An evidentiary hearing was then set for March 13, 1995. On February 21, 1995, counsel for petitioner appeared in court and informed the court that the case had been reassigned within the district attorney's office. Subsequently, on February 23, 1995, the matter was continued at the state's request so that the newly-assigned deputy district attorney could be present. On March 2, 1995, counsel appeared and the Court reaffirmed the date of March 13, 1995 for the evidentiary hearing. On March 13, 1995, the court continued the matter until April 6, 1995. Due to the ill health of Judge Guy, the matter was reset until July 13, 1995.

8. On July 13, 1995, an evidentiary hearing was held. At that hearing, Belkis Ibarra Cumerma was called and testified.

9. The court, having read the transcribed testimony of that witness finds that her testimony impeached the testimony of the state's key witness, Fernando Cabrera, and that her testimony, had it been presented to the jury, would have impeached the credibility of Fernando Cabrera. Ms. Cumerma testified that Fernando Cabrera had threatened to cause harm to petitioner after Cabrera found petitioner with Ms. Cumerma in Cabrera's home. The court notes that Ms. Cumerma was identified by petitioner to his counsel prior to trial, but that trial counsel did not attempt to locate this witness. Indeed, in post-conviction proceedings, it was Judge Guy that noted the witness' full name appeared in the record of the preliminary hearing. The Court finds that the testimony of Ms. Cumerma was material and would, in all probability have effected the outcome of the trial because the state's case depended, in large part, upon the testimony of Fernando Cabrera. The court concludes from the transcripts of the hearing that Ms. Cumerma was apparently present in Las Vegas and was registered at the Department of Motor Vehicles prior to and at the time of trial. At the time of Mr. Bailus' representation of petitioner, Ms. Cumerma was not present in Nevada, had married and changed her name. Through the investigative funds available through the federal court, Ms. Cumerma was able to be located and her testimony was, finally, heard. The Court finds that trial counsel's failure to attempt to locate, interview, and present this witness to the jury was objectively unreasonable and that the testimony of this witness would have, in reasonable probability, have effected the outcome of the trial.

10. The Court also finds, based upon the uncontradicted declarations submitted in this case on behalf of petitioner, the admission of which was stipulated to by the state which reserved its rights to object to the testimony only on the basis of waiver, that there were other witnesses reasonably available to trial counsel who would have provided testimony which the jury should have heard. These witnesses include

Roberto Escobedo, who was a friend of the victims who discovered the body. Defense counsel never interviewed this witness, and therefore the jury never learned that Fernando Cabrera knew the victim – a fact Cabrera denied at trial. Roberto Escobedo testified as a prosecution witness at trial. However, because trial counsel made no attempt to interview this witness, he remained unaware that Mr. Escobedo would provide testimony which was valuable to the defense, if asked. Other affidavits and documents submitted in this case by petitioner indicate that evidence was available to trial counsel through a number of reasonably available sources, including police reports, that should have been presented to the jury in this case by defense counsel. The lack of pre-trial investigation and preparation by trial counsel, as is set forth in the petition for writ of habeas corpus and unchallenged by the state, cannot be justified.

11. The petition filed in this case details many additional challenges to the constitutionality of the conviction and sentence. This Court has not considered these issues in light of its determination of the merits of the petition on the issue of ineffective assistance of counsel, which is indisputably present from the record. It does, however, appear from the petition, which has not been opposed by the state on its merits, that there are many additional grounds upon which relief would be warranted. The failure of trial counsel to effectively investigate and prepare this case for trial is so glaring and clear that this Court finds there is no need to proceed beyond the issue of the violation of the Sixth Amendment guarantee of effective assistance of counsel in order to decide the merits of the petition and grant relief.

12. As to the State's motion to dismiss, the court finds that this petitioner was expressly advised by both his former counsel and the state in court on November 25, 1985, that he had nine levels of appeal available to him after the denial of his direct appeal. The Court further finds that Mr. Miranda was never advised by either the Court or his counsel that the

failure to raise all issues in the prior proceedings could result in a waiver of those issues. The Court also finds from the affidavit of Mr. Bailus and the affidavit of Mr. Miranda that Mr. Miranda did not, at any time in these proceedings, make a tactical choice to forgo presenting any of the claims contained in the petition before this Court. Further, NRS 34.820(3) required that, in this death penalty case, the court was required to personally address both Miranda and Mr. Bailus and inform them that all claims which challenged the conviction and the death penalty must have been joined in the petition. This did not occur in the prior proceedings in which Mr. Miranda was represented by Mr. Bailus.

Accordingly, based upon the foregoing findings, and in accordance with NRS 34.830(1) the Courts makes the following conclusions of law.

CONCLUSIONS OF LAW

1. The failure of trial counsel to investigate and present available witness testimony, much of which had been identified to trial counsel by petitioner prior to trial, violated petitioner's rights to due process and effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. Petitioner has demonstrated in these proceedings that his trial counsel's performance fell below any reasonable objective standard of constitutionally adequate representation. Based upon this Court's consideration of the evidence that has been adduced by petitioner in these proceedings, the Court concludes that the verdict returned by the jury is unreliable. *Strickland v. Washington*, 466 U.S. 668 (1984); *Sanborn v. State*, 107 Nev. 388, 812 P.2d 1279 (1991).

2. The state has not challenged seriously the facts as set forth in the petition, nor has the state argued that trial counsel was indeed effective. The State did not file a written opposition to the petition, but instead relied solely upon its argument that petitioner's challenges to his conviction had

been waived because they had not been presented by Mr. Bailus in prior proceedings. Based upon the record in this case, including the affidavit of Mr. Bailus, the affidavit of Roberto Miranda, and the transcript of the prior proceedings, this Court concludes that Mr. Miranda did not waive his right to present the arguments contained in his petition. It is clear from the record in this case that at every point in which he was given an opportunity to do so, petitioner attempted to present all evidence which supported his innocence to the Court. The fact that there have been substantial impediments to his ability to present the evidence to support his claim of ineffective assistance of counsel cannot be attributed to the petitioner. Petitioner's claim of ineffective assistance of counsel has merit. The inability of Mr. Bailus to present the evidence since gathered by current counsel is attributable to many factors, including, as noted by Judge Guy on a number of previous occasions, the passage of time that occurred when the case was on direct appeal. In now determining the issue of ineffective assistance of counsel, supported by the additional evidence presented in these proceedings, this court finds that good cause exists to excuse any procedural default that may be suggested by the state. *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994).

ORDER

Based upon the foregoing, it is hereby ORDERED that the petition for writ of habeas corpus be granted, that the writ be issued, and that the petitioner be granted a new trial:

Dated this 13th of February, 1996.

/s/
SENIOR DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 23 2003
OFFICE OF THE CLERK

No. 02-1629

In the Supreme Court of the United States

CLARK COUNTY, NEVADA AND
MORGAN HARRIS,

Petitioners,

v.

ROBERTO MIRANDA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

THOMAS D. BEATTY
Law Offices of Thomas Beatty
601 E. Bridger Avenue
Las Vegas, NV 89101
(702) 382-5111

Counsel for Petitioner Harris

DAVID ROGER
District Attorney
JANSON F. STEWART
Chief Deputy District Attorney
500 S. Grand Central Pkwy.
Las Vegas, NV 89155
(702) 455-4761

Counsel for Petitioner Clark County

LAWRENCE S. ROBBINS*
ALAN E. UNTEREINER
ALISON BARNES
MAX HUFFMAN
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

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REPLY BRIEF FOR PETITIONERS

Respondent says that review of the Ninth Circuit's *en banc* decision is unwarranted because this case involves a "straightforward application" of the law to an "unusual" set of facts. Br. in Opp. 2, 6. Exactly the opposite is true. Review is needed because the *legal analysis* applied by the *en banc* majority to this *routine* set of facts is highly *unusual* – and in conflict with other circuits' (and this Court's) decisions.

Two threshold arguments against further review may be quickly dispatched. First, respondent asserts that the issues raised here are simply not "important." Br. in Opp. 1-2, 9-10. Surely that will come as a surprise to the majority of active Ninth Circuit judges who voted to rehear this case en banc (see FED. R. APP. P. 35(a)(2)) on the strength of respondent's petition for *en banc* rehearing, which identified both the state action question and the question whether the use of the polygraph violates the Sixth Amendment as "questions of exceptional importance." C.A. Resp. *En Banc* Reh'g Pet. 1.

Equally mistaken is respondent's mantra that review should be denied because a "factual record has yet to be developed" (Br. in Opp. 2; see also *id.* at 10, 14) and the decision below is "interlocutory" (*id.* at 1, 7, 10, 14, 20). The same, of course, could be said of *any* case coming up on a motion to dismiss where a federal court of appeals has reversed the dismissal of a complaint – including *Polk County* itself. As the same treatise cited by respondent makes clear, this Court regularly reviews interlocutory judgments of federal courts of appeals where, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." STERN, GRESSMAN, SHAPIRO & GELLER, SUPREME COURT PRACTICE 258-59 (8th ed. 2002); see, *e.g.*, *Barnes* v. *Gorman*, 536 U.S. 181 (2002); *TRW, Inc.* v. *Andrews*, 534 U.S. 19 (2001); *United Dominion Indus.* v. *United States*, 532 U.S. 822 (2001); *United States* v. *Hatter*, 532 U.S. 557 (2001). And contrary to respondent's suggestion, the *absence* of a complex record – or for that matter any factual

record at all – makes this an *ideal* vehicle for resolving the pure questions of law presented by the petition.

Once this underbrush is cleared away, respondent is left with a hodgepodge of meritless arguments for why the three issues presented do not warrant this Court's attention.

I. THE STATE ACTION QUESTION

According to respondent, the majority's state action ruling – that Chief Public Defender Harris acted under color of state law when he implemented office-wide polygraph and attorney-assignment policies – involves nothing more than the "straightforward application" of the "properly stated rule of law" announced in *Polk County*. That is untrue. *Polk County* explicitly declined to decide whether a public defender acts "under color of state law while performing certain administrative and possibly investigative functions." See 454 U.S. 312, 324-25 (1981). And if the issues raised below were truly "straightforward," they would not have evenly divided the 14 federal judges who were involved in this case in the lower courts.

Far from applying *Polk County*'s holding, the decision below "answers an important question left open by this Court in *Polk County*" – and does so "in a manner that conflicts with the decisions of other circuits." Pet. 9. As we showed in the petition (at 9-11), both the Eighth and Tenth Circuits have refused to treat as "administrative" conduct – qualifying as state action notwithstanding the holding of *Polk County* – "the *policy* of a public defender's office" to "refus[e] * * * to furnish free copies of transcripts to indigents" who are its clients. *Eling* v. *Jones*, 797 F.2d 697, 699 (8th Cir. 1986), cert. denied, 480 U.S. 917 (1987) (emphasis added); see also *Brown* v. *Langdon*, No. 93-8013, 1993 WL 372685, at *1 (10th Cir. Sept. 24, 1993) (rejecting challenge to a similar "*policy* of the Wyoming Public Defenders" and following the Eighth Circuit's holding in the "similar case" of *Eling*). Because there is no valid distinction – and certainly none identified by respondent – between a chief public defender's policy against providing free transcripts to

clients (at issue in *Eling* and *Brown*) and Morgan Harris's alleged policies relating to the assignment of attorneys and the use of polygraph examinations, the Eighth and Tenth Circuits' decisions are squarely in conflict with the decision below.

In an effort to minimize this conflict, respondent first suggests that neither *Eling* nor *Brown* actually involved a "policy" of the public defender's office. See Br. in Opp. 7-9 & nn.1, 2. That is wishful thinking. As the language just quoted shows, both cases *expressly referred* to the Public Defender's Offices' "policy" as the basis for the clients' constitutional claims. Moreover, as respondent neglects to mention, the plaintiffs in *Eling* were multiple prisoners who sued "on behalf of themselves and others similarly situated" (presumably because all members of the putative class had been subjected to the same allegedly unconstitutional policy). *Eling*, 797 F.2d at 698. Thus, it is quite clear from the Eighth Circuit's opinion that the prisoners were challenging a "policy" of the Public Defender's Office and not just (as respondent incorrectly suggests) the individualized or ad hoc decisions of individual public defenders to deny transcript copies to clients "in particular cases." Br. in Opp. 7.

Equally unsuccessful are respondent's efforts to conjure up doubt about whether *Brown* – which challenged the denial of transcripts to a single client by three separate lawyers in the Public Defender's Office – involved an office "policy" (as opposed to coincidental parallel action). According to respondent, there is ambiguity about this because "[t]he only mention of the word 'policy'" in the Tenth Circuit's decision "comes in [the] description of the *points raised by the inmate on appeal*." Br. in Opp. 9 n.2 (emphasis added). Precisely our point. And since the court of appeals went on to *reject* the "points raised by the inmate on appeal," it is difficult to see why this is not unanswerable proof that the case involved a challenge to a "policy."

In any event, respondent's attempt at verbal hairsplitting merely confirms a point we made in the petition (at 12, 20):

there is no claim of ineffective assistance by an individual public defender that cannot be repackaged as a claim challenging some "policy," "practice" or "custom" of a public defender's office. Thus, a definition of state action that hinges on whether an alleged "policy" of the public defender's office was mentioned in the complaint is a definition that allows the holding of *Polk County* to be circumvented with the stroke of a pen.

Respondent also contends that the Tenth Circuit's decision can be disregarded because it was unpublished, and he relatedly emphasizes the "paucity" of reported decisions in this area. This argument overlooks the fact that until the *en banc* decision in this case, the lower courts (including the three-judge panel in this case) were uniformly of the view that claims such as respondent's could *not* be pursued under Section 1983 because of the absence of state action. The Eighth Circuit had said so in *Eling*, and the Tenth Circuit considered the point so obvious that it did not hold oral argument and did not publish its decision. Moreover, as respondent correctly noted in his *en banc* rehearing petition (at 3), there are "abundant suits filed" implicating the holding of *Polk County* but they are "largely unpublished." Thus, it should come as no surprise that only two courts of appeals have published (conflicting) decisions on this issue in recent years. In the wake of the Ninth Circuit's breathtaking expansion of public defender liability, however, that is certain to change. See, *e.g.*, *Harris* v. *Grant*, No. CIV. A. 03-1676, 2003 WL 2006644, at *1 (E.D. Pa. Apr. 30, 2003) (denying public defender's motion to dismiss prisoner's Section 1983 claim alleging that he received "inadequate representation" because of certain office-wide "policies or customs" and citing the Ninth Circuit's *en banc* opinion as authority).

In sum, the conflict is real. The circuits are divided on the question whether policies such as those at issue in this case – which respondent admits involve "the defense of cases" (Br. in Opp. 9) – can give rise to state action because they are "administrative" in nature. The Ninth Circuit answers that question yes;

the Eighth and Tenth Circuits, no. Only this Court can bring uniformity to this critical area of federal law.

II. THE SIXTH AMENDMENT QUESTION

In our petition (at 16-22), we explained that the Ninth Circuit's Sixth Amendment holding – that the alleged resource allocation and attorney assignment policies infringe the right to effective assistance of counsel – cannot be reconciled with *Strickland* v. *Washington*, 466 U.S. 668 (1984), and its progeny. We also showed that the holding is wrong and likely to unleash a wave of new habeas and Section 1983 litigation within the Ninth Circuit as well as in other jurisdictions.

In response, respondent principally argues that the Ninth Circuit should not be faulted for failing to engage in any meaningful analysis of the constitutional issue because "the existence of a Sixth Amendment violation under *Strickland*" was "already * * * established" by a separate Nevada court opinion. Br. in Opp. 11. There are two flaws in this argument.

First, the *en banc* majority did not rely on or even mention the Nevada state court decision granting respondent's habeas petition in its brief discussion of whether petitioner Harris's alleged policies violated the Sixth Amendment. Instead, the majority broadly declared that the alleged "policy [of using polygraphs], while falling short of complete denial of counsel, *is a policy of deliberate indifference* to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt." Pet. App. 7a (emphasis added); see also *id.* at 9a-10a (same for attorney assignment policy); Pet. 17-18. For good measure, the *en banc* majority went on to state that the allocation of resources by a public defender's office

> *cannot be based solely or even principally on polygraph results*. In so holding, we *express no opinion* on whether the result of a polygraph test *may be used as one of a number of factors* employed in determining the extent of investigative resources to devote to a particular defendant's

> case. *We hold only that polygraph results cannot be determinative.*

Pet. App. 7a-8a (emphasis added). That certainly reads like a broad declaration of the constitutionality of the polygraph policy, and not, as respondent suggests, a very limited holding that is contingent upon the (unmentioned) fact that respondent had prevailed in his prior habeas challenge. Tellingly, respondent makes no attempt to defend the majority's dubious distinction between resource allocation policies that rely "solely or even principally" on "polygraph results" (which, the majority holds, violate the Sixth Amendment) and policies that rely on polygraphs only as a non-"determinative" factor (which pass muster). Pet. App. 8a.

Beyond simply misreading the Ninth Circuit's opinion, respondent's argument suffers from a second, even more fundamental flaw. It ignores the reason why the Ninth Circuit quite properly chose *not* to rely on the prior habeas proceeding – or on the state court's determination that respondent's "*trial counsel's* performance" (Br. in Opp., App. 6a (emphasis added)) fell short of the Sixth Amendment's requirements. Under *Polk County*, the actions of Thomas Rigsby, the deputy public defender, in handling respondent's criminal case *do not constitute state action*. Indeed, the *en banc* majority so held elsewhere in its opinion. See Pet. App. 4a-5a, 10a, 19a. For that reason, the Ninth Circuit could not have relied – implicitly or otherwise – on Rigsby's decisions and actions in the representation of respondent in evaluating whether the Chief Public Defender's alleged *policies* pass muster under the Sixth Amendment.[1]

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[1] Nor does the state court's habeas decision lend *factual* support to respondent's constitutional challenge to the alleged policies. The Nevada state court did not mention or rely on the alleged attorney assignment or polygraph policies of Chief Public Defender Harris in concluding that "trial counsel's performance," taken as a whole, was inadequate. See Br. in Opp., App. 4a-7a.

Respondent next argues that, consistent with *City of Canton* v. *Harris*, 489 U.S. 378 (1989), he "adequately alleged a policy that amounted to deliberate indifference and that caused the Sixth Amendment violation." Br. in Opp. 13. But *City of Canton* addressed only the "question whether the constitutional deprivation was attributable to a municipal policy or custom[,]" not whether a constitutional violation had occurred. *Collins* v. *City of Harker Heights*, 503 U.S. 115, 123 (1992) (discussing *City of Canton*, 489 U.S. at 388-89). Respondent's contention that *Strickland* is "not the issue" (at 11) is thus mistaken. And no reading of *Strickland* can support the novel Sixth Amendment rights discovered by the *en banc* majority in this case.

Lastly, respondent disputes that the decision below will foment substantial litigation. Br. in Opp. 13-14. Thus, he notes that future damages actions will be limited by *Heck* v. *Humphrey*, 512 U.S. 477, 487 (1994), which says that where a "judgment in favor of the [Section 1983] plaintiff would necessarily imply the invalidity of his conviction or sentence," the plaintiff must first obtain a reversal or invalidation of the conviction before suing under 42 U.S.C. § 1983. This argument puts the cart before the horse. The *immediate* effect of the Ninth Circuit's decision is a flood, not of Section 1983 cases, but of habeas petitions. Under the broad rationale adopted by the Ninth Circuit, for example, virtually *any* former client of the Public Defender's Office of Clark County who claims to have been subjected to the alleged polygraph or attorney assignment policy and is incarcerated can now bring a Sixth Amendment claim challenging his conviction. And, under the Ninth Circuit's broad rationale, many of those challenges (as well as challenges predicated on comparably inventive constitutional theories) are likely to be successful – thus opening the door to future Section 1983 claims notwithstanding *Heck* v. *Humphrey*. And even if this new wave of habeas petitions is unsuccessful, the state and federal courts will still be saddled with

unwarranted habeas claims based on these and similar policies allegedly used by public defenders.[2]

III. THE *MONELL* ISSUE

As we explained (Pet. 22-30), this Court should also review the Ninth Circuit's holding that petitioner *Clark County* can be held liable for the implementation of petitioner *Harris's* policies. That holding is in tension with this Court's municipal liability jurisprudence (including *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978) and *McMillian* v. *Monroe County*, 520 U.S. 781 (1997)) and with the holdings of other circuits. More specifically, the Ninth Circuit gave no explanation – and certainly none based on state law, as is required by *McMillian* – for why Harris should be treated as a final policymaker *for the County* on decisions regarding attorney assignment and resource allocation in the Public Defender's Office. Had the Ninth Circuit majority adhered to the governing legal framework, it would have reached the same conclusion as the four dissenters: "There is no reason to think that the Clark County Board of Commissioners, as opposed to the county public defender, has *any* policy, *or is allowed any say*, as to which lawyers handle which cases in the public defender's office." Pet. App. 16a (emphasis added). In fact, as we have explained (Pet. 28-30), both Nevada law and the federal Constitution protect the functional independence of the

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[2] Respondent mistakenly assumes that only those cases involving the death penalty are affected by the Ninth Circuit's Sixth Amendment holding. See Br. in Opp. 14 (emphasizing small number of "capital defendants" who have won habeas relief). The alleged policy of assigning inexperienced attorneys without providing adequate additional training, however, was not limited to capital cases. See C.A. ER 43, 45 (Cplt. ¶¶ 134, 138) (alleging "a policy, custom, or practice" of "assign[ing] inexperienced and untrained attorneys to capital *and other major felony cases*") (emphasis added). The alleged polygraph policy likewise applied to *all* clients of the Public Defender's Office. And nowhere did the *en banc* majority purport to confine its constitutional rulings to capital cases.

Chief Public Defender in making decisions and setting policies (such as those involved here) that relate to "the defense of cases" (Br. in Opp. 9) and to discharge of his ethical obligation to represent clients zealously.

Respondent offers a variety of responses, most of which seek to divert the Court's attention from the key issue under *Monell*. Thus, he spills much ink (Br. in Opp. 14-15, 16-17, 19) arguing that Harris is a "final" policymaker – even though we conceded that (Pet. 24 n.11) and even though respondent elsewhere admits that this issue is distinct from whether Harris can be said to act *for the municipality* (Br. in Opp. 17). Next, respondent contends (at 17-18) that we are really just challenging whether the Ninth Circuit correctly applied Nevada law to this case. Not so. Our complaint is not that the Ninth Circuit misunderstood or misapplied Nevada law; it is that the Ninth Circuit *ignored* it. That dereliction, we showed, is squarely at odds with this Court's teachings in *McMillian*.

Next, respondent insists that the Ninth Circuit *did* apply Nevada law in holding that petitioner Harris "acts for the county" in setting and applying the alleged policies. According to respondent, the "Ninth Circuit expressly acknowledged the role of state law, citing the very statutes regarding the establishment of public defenders' offices that petitioners claim it ignored." Br. in Opp. 18 (citing NEV. REV. STAT. §§ 180.090, 260.010, 260.040, 260.070, 260.075). That argument is flawed at every turn. Although respondent has identified the lone place in the entire majority opinion where Nevada law is cited (Pet. App. 6a), he misunderstands the Ninth Circuit's use of those citations. The *en banc* majority relied on these five provisions in concluding that petitioner Harris' functions were "administrative" and thus undertaken "under color of state law"; it did not invoke them as evidence that Clark County was properly subject to municipal liability for Harris's conduct.

In any event, the Ninth Circuit did ignore the provisions of Nevada law that count – the ones that establish the functional independence of the Public Defender's Office. Thus, it ignored

the provisions of Nevada law requiring every lawyer to "exercise independent professional judgment and render candid advice" when representing a client (Nev. Sup. Ct. Rule 167), and prohibiting interference with a lawyer's "professional judgment in rendering legal services" by a person or entity paying for such services (Nev. Sup. Ct. Rule 188.3). These rules govern the conduct of the Chief Public Defender, even in setting and implementing the "policies" of the office that will be applied to *all* of his clients. Yet the Ninth Circuit simply ignored these provisions of Nevada law establishing the functional independence of the Chief Public Defender, even though they were specifically called to the court's attention. See C.A. Br. Pet. Harris, at 6.

Finally, we note that respondent does not deny that *federal* law mandates the functional independence of the Chief Public Defender from the County with respect to decisions and policies that are directly related to the office's discharge of its responsibility to serve as a zealous advocate for clients in an adversary role vis-à-vis the State. That alone suffices to defeat municipal liability under the *Monell* principle. Respondent has no answer to this point, and there is none.

Respondent does not disagree that a likely result of the Ninth Circuit's decision is increased control by municipalities over public defenders' policies and practices. Faced with the prospect that they will now be held liable for the implementation of these policies, municipalities will undoubtedly seek to control their content and application. For a municipality attempting to honor its "constitutional obligation * * * to respect the professional independence of the public defenders whom it engages" (*Polk County*, 454 U.S. at 321-22), this is a difficult – if not impossible – task.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS D. BEATTY
Law Offices of Thomas Beatty
601 E. Bridger Avenue
Las Vegas, NV 89101
(702) 382-5111

Counsel for Petitioner Harris

DAVID ROGER
District Attorney
JANSON F. STEWART
Chief Deputy District Attorney
500 S. Grand Central Pkwy.
Las Vegas, NV 89155
(702) 455-4761

Counsel for Petitioner
Clark County

LAWRENCE S. ROBBINS*
ALAN E. UNTEREINER
ALISON BARNES
MAX HUFFMAN
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

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